No. (1) 99 49 JUL 28 1999

In the

Supreme Court of the United States

October Term, 1998

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

v

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES; VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES

NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION FOR REVIEW

WHETHER NEW JERSEY'S USE OF THE INCOME FIRST METHODOLOGY IN DETERMINING ELIGIBILITY FOR MEDICAL ASSISTANCE IMPERMISSIBLY DEPRIVES ELDERLY SPOUSES OF NURSING HOME RESIDENTS OF ESSENTIAL RESOURCES NEEDED FOR SELF-SUPPORT, IN VIOLATION OF 42 U.S.C. §1396r-5(e)(2)(C).

TABLE OF CONTENTS

Question for Review i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Statement of the Basis of Jurisdiction of the Supreme Court 1

Statutes and Regulations Involved in this Case 1

Statement of the Case 1

Argument 6

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SIGNIFICANCE OF THE QUESTION PRESENTED TO THE ADMINISTRATION OF THE FEDERAL STATUTE 7

A. The Court Decisions 8

B. The Federal Administrative Agencies 10

C. The States' Divergent Applications of the "Uniform" Law 13

II.THE COURT OF APPEALS HAS INCORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT BECAUSE OF ITS IMPACT ON A SIZEABLE AND VULNERABLE SEGMENT OF THE ELDERLY POPULATION OF THIS NATION. 18

III. THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN ITS INTERPRETATION OF THE FEDERAL STATUTE 26

Conclusion 30

Appendix

Third Circuit Opinion 1a

District Court Opinion 26a

Order of District Court 56a

Judgment of the Third Circuit 60a

Order denying Rehearing 62a

42 U.S.C. §1396r-5(e)(2)(C) 64a

N.J.A.C. 10:71-5.7(d) 65a

42 U.S.C. §1396r-5 *et seq* 66a

Chart 85a

Memo 87a

TABLE OF AUTHORITIES

Cases

Anderson v. Department of Human Services of the State of Oklahoma, 916 P. 2d 846 (Okla. Ct. App. 1995) 17

Chambers v. Ohio Department of Human Services, 145 F.3d 793 (6th Cir. 1998) 10, 16

Cleary, et al. v. Waldman,et al., 959 F.Supp. 222, 234 (D.N.J. 1997) 9, 28

Cleary et al v. Waldman et al, 167 F3d 801 (3d Cir. 1999) 11, 12, 22, 23, 26

Comis v. Bullen, No. 94-4513 (Mass. Sup. Ct. Jan. 31, 1996) 5, 8

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) 26

Golf v. New York Dept. of Social Services, 634 N.Y.S. 2d 581 (A.D. 4th Dept. 1995) 5, 8

Golf v. New York State Department of Social Services, 91 N.Y.2d 656 (1998) 10, 16, 24

Gruber v. Ohio Dept. of Human Services, 98 Ohio App.3d 72 (Delaware Cty. 1994) 5

Gruber v. Ohio Dept. of Human Services, 647 N.E. 2d 861 (5th Dist. Ct. App. 1995), *discretionary appeal not allowed*, 644 N.E. 2d 409 (Oh. 1995) 8

Hurly v. Houston, No. 93-3666 (E.D. Pa. July 1, 1996). 5, 9, 15

Kimnach v. Ohio Dept. of Human Services, 96 Ohio App.3d 640 (Franklin Cty. 1994) 5, 8

Lavery in O'Callahan v. Commissioner of Social Services, __ A.2d __, 53 Conn. App. 191 (1999) 22

McGraw v. Agency for Health Care Administration, Appeal No.98F-3528 15

Patterson v. Shumate, 504 U.S. 753(1992) 27

Patterson v. Shumate, 504 U.S. 753, 766 (1991) 28

Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 557-558 (1990) 26

State of Ohio ex rel. Chambers v. Ohio Dept. of Human Services, No. C-2-94-1094 (S.D.Oh. Feb. 16, 1996) 5, 8

Thomas v. Commissioner of the Division of Medical Assistance, 682 N.E.2d 874 (Mass. 1997) 9, 16, 18, 21

Other Authorities

Spillman and Kemper, *Lifetime Patterns of Payment for Nursing Home Care*, Medical Care, Vol. 33, No. 3, pp. 280, 281 (1995). 2

133 Cong.Rec. 29,356 (1987) 25

H.R. Rep. No. 100-105(II), 100th Cong., 2nd Sess. 4, reprinted in 1988 U.S.C.C.A.N. 857, 892 ..... 7, 22

U.S. Bureau of the Census, 1993 Press Release, *Nursing Home Population Increase in Every State*, CB93-117. 24

U.S. Bureau of the Census. Current Population Reports, Special Studies, P23-190, *65+ in the United States*. U.S. Government Printing Office, Washington, DC, 1996 24

U.S. Census Bureau. Current Population Reports, Household Economic Studies, P70-47, Asset Ownership of Households:1993 2

Rules and Regulations

10 COLO. CODE REGS. §2505-10, Rule 8.112.13(E) 15

40 TEX. ADMIN.CODE §15:503(j) 15

441 IOWA ADMIN. CODE r. 75.5(3)(f) 17

FLA. ADMIN. CODE ANN. r. 65A-1.701; 907 15

ILL. ADMIN. CODE tit. 89, §120.379 17

KY. ADMIN. REGS. 1:655, Section 3(6)(d) 15

KAN. ADMIN. REGS. §30-6-106 17

N.D.ADMIN.CODE §75-02-02.1-24(7)(e) 15

N.H.CODE ADMIN R.He-W 656.01 15

N.J.A.C. 10:71-5.7(d) 1, 5, 27

OHIO ADMIN. CODE §5101 14
OHIO ADMIN. CODE §5101:6-7-02 8
UTAH CODE ANN. §26-18-3.6 15
VA.CODE ANN. §20-88.02:1 17

Statutes

28 U.S.C. §1254(1) 1
42 U.S.C. §1396 *et seq.*, ... 2
42 U.S.C. §1396r-5 *et seq* 1, 3
42 U.S.C. § 1396r-5(b)(2) 29
42 U.S.C. §1396r-5(c) 3
42 U.S.C. § 1396r-5(c)(1)(A) 28
42 U.S.C. §1396r-5(d) 4
42 U.S.C. §1396r-5(d)(3) 3
42 U.S.C. §1396r-5(d)(3)(a) 13
42 U.S.C. §1396r-5(e) 14
42 U.S.C. §1396r-5 (e)(2)(C) ..... passim
42 U.S.C. §1396r-5(f)(2)(a)(iii) 12
42 U.S.C. §1983 2
MASS. GEN. L. ch. 118E, §21A 9, 14
MINN. STAT. ANN.§256B.059.4 17
NEV. REV. STAT. ANN. §123.259(5) 15

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Third Circuit, dated February 8, 1999, are set forth in the Appendix at p.1a and p.60a respectively; the opinion is reported at 167 F.3d 801. The opinion and order and the opinion of the United States District Court for the District of New Jersey, dated February 25, 1997, are set forth in the Appendix at p.26a and p. 57a respectively; the opinion is reported at 959 F.Supp. 222. A timely petition for rehearing was denied by order dated March 30, 1999 which is set forth in the Appendix at p.62a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 8, 1999. A timely petition for rehearing was denied by order dated March 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

1. 42 U.S.C. §1396r-5(e)(2)(C). Appendix p.64a.
2. N.J.A.C. 10:71-5.7(d). Appendix p.65a.
3. 42 U.S.C. §1396r-5 *et seq.* Appendix p.66a.

STATEMENT OF THE CASE

Elderly American couples are those deeply affected by this litigation. The median net asset worth of married-couple households where the head of household was 65 years

of age or older, measured by the U.S. Census Bureau in 1993, was $129,790, including home equity, and $44,410, excluding home equity.[1] In 1991, one year of nursing home care cost approximately $30,000, which exceeded the nonhousing assets of more than half the elderly.[2]

In this class action litigation, Petitioners Thomas J. and Carolyne Cleary represent themselves and the class of all persons who are, were, or in the future will become "institutionalized spouses" in New Jersey nursing facilities and "community spouses" of such individuals. Suit was brought in the United States District Court for the District of New Jersey, pursuant to 42 U.S.C. §1983, alleging that various regulations, practices and policies of the State Defendants violate Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, and the Supremacy Clause and the Due Process Clause of the Fourteenth Amendment. Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, is the controlling law.

Petitioners challenged New Jersey's method of apportioning the resources of a married couple when the institutionalized spouse seeks eligibility for medical assistance ("Medicaid") benefits for his care in the facility.[3] Specifically, in their Complaint filed on October 10, 1996, Petitioners claimed that the New Jersey Department of Human Services ("New Jersey") violated Federal Law in its implementation of 42 U.S.C. §1396r-5(e)(2)(C)("section

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[1] U.S. Census Bureau. Current Population Reports, Household Economic Studies, P70-47, Asset Ownership of Households:1993.

[2] Spillman and Kemper, *Lifetime Patterns of Payment for Nursing Home Care*, Medical Care, Vol. 33, No. 3, pp. 280, 281 (1995).

[3] Pronouns will reflect a male institutionalized spouse primarily for convenience; however, as will be discussed, the statutory provision at issue is most likely to be applicable when that is the case.

(e)(2)(C)"), which provides for an allocation of additional resources for a community spouse when needed to generate additional income for her support. Petitioners sought declaratory and injunctive relief.

The Medicaid program, established in 1965, is a joint federal-state program. In order to receive the federal financial assistance provided by the program, a State must comply with the mandates of the federal law.

Section 303(a)(1) of the Medicare Catastrophic Coverage Act of 1988 ("MCCA") amended Medicaid law by adding section 1924 to Title XIX of the Social Security Act. Codified at 42 U.S.C. §1396r-5 *et seq.*, this section is familiarly known as the "spousal impoverishment provisions." See Appendix p.66a. This legislation markedly changed the rules for the treatment of income and resources when determining eligibility for a Medicaid nursing home grant for an institutionalized spouse, with its stated purpose being to alleviate the economic hardships confronted by the spouse remaining in the community.

Under the spousal impoverishment provisions, a community spouse is entitled to a protected share of the couple's resources, which is generally one-half of the resources owned by the couple at the date of institutionalization ("standard spousal share"), 42 U.S.C. §1396r-5(c), and a minimum monthly maintenance needs allowance ("MMMNA"), 42 U.S.C. §1396r-5(d)(3), which is an income level that is considered minimal for independent living. These two components of the spousal provisions are not disputed.

In addition, pursuant to section (e)(2)(C), a community spouse is entitled to an allocation of resources in an

amount greater than the standard spousal share if needed to bring her monthly income to the MMMNA level:

> REVISION OF COMMUNITY SPOUSE RESOURCE ALLOWANCE.--If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. §1396r-5 (e)(2)(C). New Jersey's implementation of this section, which limits a community spouse's ability to increase her resource allowance, is the sole issue presented for the consideration of this Court.

The following additional rule of the spousal statute must be understood in order to comprehend New Jersey's methodology. After an institutionalized spouse becomes eligible for Medicaid, all of his monthly income is applied toward his institutional care, less certain allowable deductions. 42 U.S.C. §1396r-5(d). One of the deductions is a community spouse monthly income allowance, which is an amount that may be contributed to a community spouse whose monthly income is insufficient to reach her MMMNA from both her regular income and the income generated by her spousal share of the resources.

In applying section (e)(2)(C), New Jersey improperly utilizes the post-eligibility rule to attribute to the community

spouse as much of the institutionalized spouse's income as is needed to achieve her MMMNA, instead of increasing the resource allowance of the community spouse. N.J.A.C. 10:71-5.7(d). Appendix p.65a. Federal law, which is controlling, does not permit New Jersey's "income first" approach; the federal scheme requires a "resource first" method, by which additional resources are set aside to generate income for the community spouse. Thus a community spouse in New Jersey is deprived of a significant amount of resources which she is entitled by federal law to keep and the eligibility of the institutionalized spouse for Medicaid is impermissibly postponed.

The resource first method had uniformly been adopted by all reviewing courts as the legally correct application of the Medicaid law at issue, or the same result obtained under the terms of a court-approved settlement, prior to the decision of the district court below in this matter.[4]

In denying Petitioners' Motion for Preliminary Injunction for failure to establish a likelihood of success on the merits, the district court found both the income first and resource first methods permissible, thus laying a faulty cornerstone upon which subsequent court decisions rested, and leading to a wide split among the states in the implementation of the federal law.[5] By Order dated February

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[4] *See State of Ohio ex rel. Robert Chambers et al. v. Ohio Dept. of Human Services*, No. C-2-94-1094 (S.D.Oh. Feb.16, 1996) (Order granting plaintiffs' motion for partial summary judgment); *Hurly v. Houstoun*, No. 93- 3666 (E.D.Pa. July 1, 1996) (Order approving class action settlement); *Comis v. Bullen*, No. 94-4513 (Mass. Sup. Ct. Jan. 31, 1996) (Memorandum of Decision and Order granting plaintiffs' motion for partial summary judgment); *Golf v. New York Dept. of Social Services*, 634 N.Y.S. 2d 581 (A.D. 4th Dept. 1995); *Kimnach v. Ohio Dept. of Human Services*, 96 Ohio App.3d 640 (Franklin Cty. 1994); *Gruber v. Ohio Dept. of Human Services*, 98 Ohio App.3d 72 (Delaware Cty. 1994).

8, 1999, the United States Court of Appeals for the Third Circuit affirmed the district court judgment. A Petition for Rehearing was filed and denied by Order dated March 30, 1999. In the instant petition, review of the judgment of the court of appeals is sought.

ARGUMENT

A writ of certiorari should be granted in this case because (i) this Court's resolution of the question presented will positively impact the administration of a federal statute; (ii) a resolution of the question presented is of vital importance to a vulnerable and sizeable segment of the elderly public in all of the states and will have an impact far beyond the particular facts and parties involved in the instant action; and (iii) the court of appeals has erred in its construction of the law.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SIGNIFICANCE OF

[5] Mr. and Mrs. Cleary also sought declaratory and injunctive relief on the issue of their federal right to be adequately notified of Medicaid eligibility requirements and procedures. At the hearing on the motion for preliminary injunctive relief, New Jersey was ordered to take corrective action; subsequently, the application for injunctive relief on that issue was denied without prejudice in the event that the state did not comply. *Cleary, et al. v. Waldman,et al.*, 959 F.Supp. 222, 234 (1997).

THE QUESTION PRESENTED TO THE ADMINISTRATION OF THE FEDERAL STATUTE.

In enacting the spousal impoverishment provisions in 1988, Congress's objective was clear that states were not free to interpret the statute differently:

> This bill establishes a uniform national spousal protection policy that applies in all States, whether they are 'SSI,' '209(b),' 'medically needy,' or 'special income level' States, and whether or not they are community property jurisdictions.

H.R. Rep. No. 100-105(II), 100th Cong., 2nd Sess. 4, reprinted in 1988 U.S.C.C.A.N. 857, 892 (emphasis added).

The actual practice across the nation is a patchwork of radically different applications of the law. Currently, at least ten states, among them California, Florida and Pennsylvania, are resource first states. At least six states, among them Colorado, Texas and Wisconsin, are income first states. See Appendix p.85a. At least two states, North Carolina and Alabama do not appear to provide at all for the right to revise the spousal share. A complete discussion of nationwide application of the law follows at Part "C" below.

Neither the court decisions nor the pronouncements of the federal agencies responsible for administering the Medicaid program have correctly applied the law in this matter. As a result, the uniform spousal protection program intended by Congress has not been achieved.

A. The Court Decisions

In *State of Ohio ex rel. Chambers v. Ohio Dept. of Human Services*, No. C-2-94-1094 (S.D.Oh. Feb. 16, 1996), the Ohio district court addressed the precise issue involved here: "whether the institutionalized spouse can transfer to his community spouse resources attributed to him, before he transfers income, in an attempt to raise the community spouse's income to the MMMNA." *Id.* at 16. The *Chambers* court, to which the class action case had been removed by the Ohio Department of Human Services following two unfavorable state appellate court rulings[6], adopted the reasoning of the state courts that MCCA mandates a resource-first approach. In 1996, the Ohio Administrative Code was revised to require the resource first approach.[7]

Resource first was mandated when litigated in New York courts as well. In *Golf v. New York Dept. of Social Services*, 634 N.Y.S. 2d 581 (A.D. 4th Dept. 1995), the Appellate Division unanimously reversed a lower court determination that the Department's income first methodology was acceptable and held that the State Department had erred in not employing the resource first method. Similarly, the Massachusetts Superior Court held the income first methodology to be impermissible. *Comis v. Bullen*, No. 94-4513 (Mass. Sup. Ct. Jan. 31, 1996). Consequently, Massachusetts General Laws were amended to require resource first methodology.[8] In *Hurly v. Houstoun*, No. 93-3666 (E.D.Pa.

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[6] *Kimnach v. Ohio Dept. of Human Services*, 645 N.E.2d 825 (10th Dist. Ct. App. 1994), *discretionary appeal not allowed*, 644 N.E. 2d 409 (Oh. 1995); *Gruber v. Ohio Dept. of Human Services*, 647 N.E. 2d 861 (5th Dist. Ct. App. 1995), *discretionary appeal not allowed*, 644 N.E. 2d 409 (Oh. 1995).

[7] OHIO ADMIN. CODE §5101:6-7-02.

July 1, 1996), the United States District Court for the Eastern District of Pennsylvania approved a class action settlement which by its terms mandated a resource first methodology to be used throughout the Commonwealth of Pennsylvania.

Thus, until 1996, where any state's application of section (e)(2)(C) had been submitted for judicial determination, the results were unanimous - the statutory scheme and plain language of the spousal provisions demanded the resource first approach.

In October of 1996, the instant action was commenced in the United States District Court for the District of New Jersey which departed from the federal statute and the prior decisional law in concluding that "New Jersey's income first method is at least a permissible application of the statute." *Cleary, et al. v. Waldman,et al.*, 959 F.Supp. 222, 234 (D.N.J. 1997). Unfortunately, *Cleary* set off a chain reaction of cases adopting its flawed holding.

On the strength of the *Cleary* decision, the Massachusetts Supreme Judicial Court held that the state agency had not violated federal law by deeming income to the institutionalized spouse under section (e)(2)(C).[9] *Thomas v. Commissioner of the Division of Medical Assistance*, 682 N.E.2d 874 (Mass. 1997) (citing extensively to the *Cleary* district court opinion).[10]

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[8] MASS. GEN. L. ch. 118E, §21A.

[9] This decision is applicable only to state action prior to the legislative adoption of the resource first method.

[10] The original plaintiffs in the Massachusetts case, the Comises and Lewins, had filed stipulations of dismissal and Amelia Thomas and Dorothy Smith became the representative parties.

On April 2, 1998, the State of New York Court of Appeals reversed the judgment of a lower appellate court, holding that the State agency had acted permissibly in utilizing the income first rule, also relying heavily on *Cleary*. *Golf v. New York State Department of Social Services*, 91 N.Y.2d 656 (1998).

Finally, the United States Court of Appeals for the Sixth Circuit reversed the *Chambers* district court case and determined that the Ohio State Department's decision to apply the income first approach under the prior state law had been reasonable and permissible. *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir. 1998). The Sixth Circuit relied upon the district court in *Cleary*, and its spin-off, *Thomas*, as having "endorsed this approach as compatible with the MCCA." *Chambers*, 145 F.3d at 804.

The foregoing court decisions have not resolved the struggle over "income first" vs. "resource first"; quite to the contrary, awareness and uncertainty have been heightened. For example, the New York State Bar is seeking a legislative amendment to the state's Social Services law to repeal the holding of *Golf, supra,* and reinstate the resource first rule.[11]

B. The Federal Administrative Agencies

The United States Department of Human Services ("HHS"), the federal agency responsible for administering the Medicaid Program, has delegated this responsibility to the Health Care Financing Administration ("HCFA"). The court

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[11] "Report on Proposed Legislation to Amend New York State's Social Services Law in Regard to Eligibility for Nursing Home Medicaid", Executive Committee of the Elder Law Section of the New York State Bar (Nov. 1998).

of appeals in this case stated that HHS and HCFA "have clearly stated their views, albeit by policy letters, that the states should have the discretion to employ either an income-first or a resource-first method." *Cleary et al v. Waldman et al,* 167 F3d 801 (3d Cir. 1999). The court of appeals deferred to the agency pronouncements as "consistent" and "reasonable given the language and purpose of the Act." *Cleary*, 167 F.3d at 808. Petitioners respectfully disagree.

HHS and HCFA have fueled the resource first/income first debate by making pronouncements, in response to State inquiries about section (e)(2)(C), that are inconsistent, incorrect and, most importantly, that countenance a discretion not authorized by the statute.

For example, in a Chicago Regional letter, Medicaid personnel were advised that the (e)(2)(C) resource revision should take place after eligibility is established and referenced a federal State Medicaid Manual §3262.3, requiring an income- first approach.[12] This directive was corrected by the Director of the Medicaid Bureau Sally Richardson, by Memorandum of March 4, 1994, as follows:

> The State Medicaid Manual (SMM) provision which covers this issue is located in §3262.3....We have never intended to mandate this policy....The income first rule is not specified by the statute and as such is a "derived" policy. As a result, the policy should not be considered as binding....[W]e believe that States may have been somewhat confused about our position on the income first issue. We would now like to clarify that States have

[12] Chicago Regional State Letter 51-93 (December 1993).

> the option to use the income first rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.[13]

Although the court of appeals had the opportunity to review that memorandum, it relied instead on the disavowed §3262.3 for the requirement that states should adopt an income first approach. *Cleary,* 167 F.3d at 807, n.3. In addition, the court of appeals erroneously asserted that the agencies have stated that the resource first method, although permissible, is not binding. *Id.* at 806-807. Correctly put, the agency communications are explicit in finding the income first method not binding and both of the methods permissible until final regulations are issued. Even the agency errs, however, in declaring its fence-straddling tolerance for both methods pending final regulations, which, despite the passage of 11 years, are not on the horizon.

The spousal impoverishment statute does not permit a discretionary application of section (e)(2)(C). Where discretion is allowed in the federal Medicaid law, it is explicit. For example, the standard spousal share is one-half of a couple's assets, up to a maximum amount. Under the statute, a state can elect to use the maximum as a floor rather than a ceiling - in other words, discretion is given to enhance the spousal share. 42 U.S.C. §1396r-5(f)(2)(a)(iii). Similarly, the MMMNA starts from a standard base amount, to which is added certain shelter costs of the individual community spouse, up to a maximum. States are empowered by the statute to elect to use the maximum amount regardless of the

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[13] Memorandum from Medicaid Bureau Director Sally Richardson (March 1994)(emphases added). Appendix p.87a.

individual circumstances - again, to enhance the spousal entitlement. 42 U.S.C. §1396r-5(d)(3)(a).

In contrast, the income first method was created and has flourished in a statutory vacuum. Income first was devised by the states to condition and limit a community spouse's access to an entitlement granted by Congress. Income first is not only a violation of the federal law, it is antithetical to the remedial nature of the Medicaid laws. The federal administrative agencies have perpetuated the distortion, if not abuse, of the spousal impoverishment legislation in their endorsement of the inappropriate either/or discretionary approach.

Although the spousal provisions were enacted in 1988, HHS and HCFA have failed to promulgate rules despite an acknowledged intent to do so. By perpetuating 11 years of a statutory "no man's land," the agencies have spawned expensive, time-consuming litigation, robbed the law of its clarity and certainty of application, and contributed to the unnecessary impoverishment of countless community spouses.

C. The States' Divergent Applications of the "Uniform" Law

An examination of the varying interpretations and applications of section (e)(2)(C) throughout the states reveals that Congress's goal of establishing a uniform national set of rules for determining the medical assistance eligibility of institutionalized spouses has failed dismally.

In some states, section (e)(2)(C)appears not to be implemented in any form with no effort made to increase the

resource share of the community spouse. The federal statute spells out that in order to establish the need for an additional share of the resources, either spouse must first apply for benefits and then request a fair hearing. 42 U.S.C. §1396r-5(e). Accordingly, nursing home residents and their spouses must be notified of the entitlement and the process of taking advantage of it. In the instant case, as well as in its counterparts in Pennsylvania and Ohio, the threshold claim was the lack of appropriate notice to class members regarding section (e)(2)(C) and the opportunity to increase the resource share of the community spouse. Basically, the section was seldom, if ever, acknowledged or applied by the various state agencies administering the Medicaid program. It is reasonable to assume that other states similarly deprive their elderly of the full panoply of federally conferred rights.

In the absence of litigation, the application by other states of section (e)(2)(C) is difficult to discern, since many state agencies have not promulgated regulations, or have promulgated regulations that mirror the federal provision. Informal interviews with state resource persons did not shed light on actual practice. Yet, the following information was gathered, which should inform this Court of the breadth of disparity and depth of misunderstanding surrounding the issue.

Massachusetts and Ohio are resource first states, pursuant to express state regulatory language.[14] Pennsylvania is a resource first state as a result of the court approved settlement of litigation concerning this issue.[15] Colorado, Maryland, North Dakota, Texas and Wisconsin are income first states, pursuant to express state regulatory language.[16]

[14] MASS.GEN.L.ch.118E §21A; OHIO ADMIN. CODE §5101.

[15] *Hurly v. Houston*, No. 93-3666 (E.D. Pa. July 1, 1996).

New Hampshire has proposed regulations which mandate the income first methodology. The proposed regulations embrace the language of the federal State Medicaid Manual §3262.3, expressly requiring that the institutionalized spouse must have allocated the maximum amount of income in order for a community spouse to receive additional resources under section (e)(2)(C).[17] This, despite, the agency memorandum rescinding that requirement, and despite the fact that there is no "allocation" of income from an institutionalized spouse to a community spouse prior to eligibility.

Florida, Kentucky, Nevada and Utah have statutory provisions that basically mirror the federal section (e)(2)(C).[18] Petitioners have not been able to determine how the law is actually applied in Kentucky or Utah. Nevada and Florida are resource first states.

In *McGraw v. Agency for Health Care Administration,* Appeal No.98F-3528 in the Office of Appeal Hearings for the State of Florida, Department of Children and Families, Petitioner's attorney argued that neither the Federal statute nor the Florida regulation required the community spouse to take the income of the institutionalized spouse prior to seeking the reallocation of resources. Counsel for the Department, on the other hand, raised the decisions of the United States Court of Appeals for the Sixth Circuit in *Chambers v. Ohio Department of Human Services,* the Court of Appeals of

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[16] 10 COLO. CODE REGS. §2505-10, Rule 8.112.13(E); MD. REGS. CODE tit. 10, §10.09.24.10-1(F)(4); N.D.ADMIN.CODE §75-02-02.1-24(7)(e); 40 TEX. ADMIN.CODE §15:503(j); WIS.STAT.ANN. §49.455(8)(d).

[17] N.H.CODE ADMIN R.He-W 656.01 (proposed April 14, 1999).

[18] FLA. ADMIN. CODE ANN. R. 65A-1.701; 907 KY. ADMIN. REGS. 1:655, SECTION 3(6)(D); NEV. REV. STAT. ANN. §123.259(5); UTAH CODE ANN. §26-18-3.6

New York in *Golf v. New York State Department of Social Services,* and the Massachusetts Supreme Judicial Court in *Thomas v. Commissioner of the Division of Medical Assistance* for the conclusion that the income first methodology is a valid interpretation of both the federal law and the Florida Administrative Code. Nevertheless, the hearing officer ruled that the resource first approach had been established by precedence in the Florida Office of Appeal Hearings and, in the absence of being provided with any information that the Department had elected either option, she would continue to follow the existing precedent of not counting the institutionalized spouse's income in determining the amount of assets the community spouse will need to bring her up to her alloted income amount. The Department's action to deny Medicaid benefits to the Petitioner was reversed.

California has not promulgated regulations under the spousal impoverishment provisions, but relies instead on the federal section (e)(2)(C), which it interprets to require a resource first approach. Responses regarding the application of the law in the State of Delaware were vague; however, one resource person stated his belief that a resource first method was permitted in Delaware, based on his knowledge of one precedent in which an applicant had been represented by a legal aid attorney. Although not absolutely determinative from their regulations, Illinois, Iowa, Minnesota and Virginia appear to be resource first states based on regulations that comprehensively establish the analyses to be followed by the hearing officer in determining the revised share, without any

language that refers to a consideration of the income of the institutionalized spouse.[19]

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[19] ILL. ADMIN. CODE tit. 89, §120.379; [illegible] IOWA ADMIN. CODE r.

Kansas has promulgated relevant regulations; however, the only reference to a resource revision procedure states that a greater property allowance is provided under a Court Order of Support or through the fair hearing process. The methodology used in the fair hearing process is unknown, despite Petitioners' efforts to acquire such information.[20] Alabama and North Carolina have promulgated comprehensive regulations for the spousal impoverishment scheme, but have neglected to include any provision for the section (e)(2)(C) entitlement.[21]

A total misunderstanding of section (e)(2)(C) makes even the income first/resource first distinction immaterial in some states. In *Anderson v. Department of Human Services of the State of Oklahoma*, 916 P. 2d 846 (Okla. Ct. App. 1995), the court, considering an "issue of first impression," essentially eviscerated section (e)(2)(C) by restricting it "only to post- eligibility situations or to those applicants seeking an assessment but not Medicaid." *Id.* at 850. Similarly, South Carolina has a regulation that allows for a higher amount of resources to be allocated to a community spouse only upon justification that exceptional circumstances resulting in significant financial duress would occur unless an additional amount is made available,[22] a blatantly incorrect standard.[23]

75.5(3)(f); MINN. STAT. ANN.§256B.059.4; VA.CODE ANN. §20-88.02:1.

[20] KAN. ADMIN. REGS. §30-6-106.

[21] Alabama Medicaid Agency Administrative Code Rule No. 560-X-25-.16; N.C. Aged, Blind and Disabled Medicaid Manual, change no. 15-94.

[22] South Carolina Medicaid policy manual 12.06.06.

[23] Petitioners were unable to obtain firm information about the methodologies, if any, used in the remaining states.

II. THE COURT OF APPEALS HAS INCORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT BECAUSE OF ITS IMPACT ON A SIZEABLE AND VULNERABLE SEGMENT OF THE ELDERLY POPULATION OF THIS NATION.

In enacting the spousal provisions, Congress intended to foster economic independence and dignity for the community spouse, declaring:

> The objective of the MCCA was to protect married couples when one spouse is institutionalized in a nursing home, so that the spouse who continues to reside in the community is not impoverished and has sufficient income and resources to live independently.

H.R.Rep. No. 100-105(II), 100th Cong., 2d Sess. at 65 (1988), reprinted in 1988 U.S.C.C.A.N. 857, 888.

In *Thomas v. Commissioner of the Division of Medical Assistance*, 682 N.E.2d 874, 880 (Mass. 1997), the Massachusetts Supreme Judicial Court held that the income first rule was a permissible one that "did not necessarily frustrate the policy objectives underlying the MCCA." In *Thomas*, George Smith had entered a nursing facility in June of 1994 as a permanent resident, at which time the resources of George and his wife Dorothy were $54,300. Under the spousal provisions, Dorothy was automatically entitled to the one-half standard spousal share of $27,150. Without the benefit of section (e)(2)(C), George would not be eligible for

Medicaid until the remaining $27,150, less George's small allowable amount of $2,000, was depleted.

Since Dorothy's income consisted of a monthly Social Security payment of $325 plus $61 deemed available from earnings from her one-half share, she properly requested a "fair hearing" under section (e)(2)(C) to establish a larger resource allowance in an amount adequate to provide additional income. The hearing officer determined that her MMMNA was $1,375, leaving a shortfall of $989. George's monthly income was $1,079, consisting of a Social Security payment of $892 and a pension of $187.

The hearing officer applied the income first rule by adding $989 of George's income to Dorothy's income, a procedure not authorized by the law. He then concluded that Dorothy did not need any additional resources. In essence, the hearing officer's income first approach nullified a benefit otherwise available to Dorothy under the federal scheme.

At the end of the day, Dorothy was left to support herself for the rest of her life with whatever remains of her $27,150 share of the couple's resources, plus monthly income of $1,375 for as long as George lives. Out of these minimal resources, among other things, she will have to pay for her supplemental health insurance, a major expense for the elderly, and her home maintenance costs, whether rented or owned. She will hope that the exigencies of advancing age will not cause her to require household help or necessitate a move to an assisted living or personal care home, with the accompanying costs that could deplete her resources in one year. In other words, she will hope to not outlive her money. Had the spousal impoverishment statute been correctly

applied, Dorothy might have had significantly more assets and more to hope for.

In the general population, the need for personal assistance with everyday activities increases with age, and, although women live longer than men, functional limitations are more prevalent among women than men.[24] According to 1990 and 1991 data from the U.S. Bureau of Census, among the non-institutionalized population, 33 percent of women aged 75 or older needed help, compared with 23 percent of the men in that age category.[25]

Highly significant to the instant issue, those statistics establish that female community spouses are more likely to have excess medical and personal care costs, often uninsured. In addition, they are more likely to be the victims of the income first rule, since male community spouses are less likely to have insufficient income, and, thus, are less likely to be entitled to a revision of the community spouse resource allowance. In other words, male community spouses will rarely need section (e)(2)(C).

Dorothy's predicament will likely worsen when George dies. Widowhood is a common marital status for elderly women in the United States. The proportions are striking. More than one in three women aged 65 to 74 in 1993 were widowed. After age 75, the likelihood that a woman is widowed increases rapidly. In 1993, almost three in five women aged 75 to 84 and four in five women aged 85 years and over were widowed.[26] Should George predecease

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[24] U.S. Bureau of the Census. Current Population Reports, Special Studies, P23-190, *65+ in the United States,* 3-20. U.S. Government Printing Office, Washington, DC, 1996.

[25] *Id.* at 3-18 to 3-19.

Dorothy, she will be entitled to retain the higher of the two Social Security payments received by George and her. 20 C.F.R. 404.338. She will receive George's $892 and forfeit her $325. Most likely, George's pension of $187 will terminate. Dorothy will be left with $892 per month and whatever may remain of the one-half share of the savings that she and George had accumulated for their security in old age. Whereas the resource first rule would have resulted in a permanent transfer of resources, the income first rule results only in a temporary shift of income which may terminate or diminish in time.

But, says the *Thomas* court, "[w]hile it is true that the income deemed to the community spouse from the institutionalized spouse was not guaranteed on the death of the latter, it seems unlikely that Congress would require States to create an endowment which would forever provide the community spouse with income and totally immunize a substantial portion of the institutionalized spouse's resources from having to pay for nursing home care." *Thomas,* 682 N.E.2d at 880-881.

Petitioners respectfully disagree. Surely, Congress intended a community spouse's income to last for her lifetime. To assume otherwise is illogical and offensive. Furthermore, those community spouses who become eligible for a resource revision do not receive an "endowment," since it is the couple's own assets, their life savings, that constitute the resources. No private or federal grant is made to the community spouse; no windfall occurs.

In the opinion of the district court in the instant case, the resource first method would "subvert the...purpose of the

[26] *Id.* at 6-3 to 6-4.

MCCA which is to require couples to bear a reasonable amount of the costs of institutionalization and thus preserve Medicaid resources." *Cleary,* 959 F.Supp. at 227. But compare the words of Judge *Lavery in O'Callahan v. Commissioner of Social Services,* __ A.2d __, 53 Conn. App. 191 (1999):

> Our interpretation does not, as the defendant claims, undermine an important objective of the MCCA. Section 1396r-5 (e)(2)(C) was enacted as part of the MCCA. The legislative history of the MCCA establishes that Congress sought to end the pauperization of community spouses "by assuring that the community spouse has a sufficient--but not excessive--amount of income and resources available to her while her spouse is in a nursing home." H.R.Rep. No. 100- 105(II), 100th Cong., 2d Sess. at 65 (1988), reprinted in 1988 U.S.C.C.A.N. 857, 888. The defendant claims that our conclusion will provide the plaintiff with an excessive amount of resources. The defendant's argument fails because it ignores that §1396r-5 (e)(2)(C) places a ceiling on the amount of resources a hearing officer can transfer to the resource allowance. Section 1396r-5 (e)(2)(C) limits the transfer of resources to "an amount adequate to provide such a minimum monthly maintenance needs allowance".

In 1991, one year of nursing home care at private pay rates cost approximately $30,000, which, at that time, exceeded the nonhousing assets of more than half the

elderly.[27] In 1993, the median net asset worth of married-couple households where the head of household was 65 years of age or older was $129,790, including home equity. Excluding home equity, the net asset worth was $44,410.[28] In 1995, the median net worth including home equity of all older households (65+) was $86,300. Where the head of household was 75+ years, the median net worth including home equity was $77,700.[29]

This case is worthy of review by this Honorable Court because of its enormous impact on institutionalized and community spouses throughout this nation, who are subject to the random application by their home states of a supposedly uniform federal statute intended to protect them from impoverishement. The district court predicted that the application of the income first rule would cause substantial numbers of private-pay patients to become Medicaid patients immediately and cause there to be far fewer private-pay patients in the future. *Cleary,* 959 F. Supp. at 226. The district court had no evidence to support that prediction, and succumbed to an hysteria fostered by New Jersey and the nursing home associations which had intervened. The district court failed to consider the following counterweights:

* A resource revision occurs only within strict limits, and is available only to those community spouses whose income is below the amount that Congress has determined to be minimal for independent living.

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[27] Spillman and Kemper, *Lifetime Patterns of Payment for Nursing Home Care*, Medical Care, Vol. 33, No. 3, pp. 280, 281 (1995).

[28] U.S. Census Bureau. Current Population Reports, Household Economic Studies, P70-47, Asset Ownership of Households:1993.

[29] Profile of Older Americans:1996, a publication of the federal Administration on Aging.

* The majority of nursing home residents are female and male community spouses are far less likely to require additional resources since their income will seldom be statutorily insufficient. In 1991, in addition to Social Security, 13.7 million retirees received pension benefits, of which two-thirds were men.[30]

* In 1990, 1.6 million of the United States elderly (5 percent of all elderly) lived in nursing homes. Of those in nursing homes, 7 in 10 were female and of the total population in nursing homes, about 1 in 7 people were married. The greater majority were widowed.[31]

Thus, the apocalyptic collapse of the public treasury feared by the district court would not likely materialize. Moreover, as expressed by Judge Bellacosa, dissenting in *Golf v. New York State Department of Social Services,* 91 N.Y.2d 656, 683(1998),

> A more restrictive administrative policy...should not be judicially countenanced based on arguments addressed to...speculative fiscal hypotheticals....Lest there be any doubt whatsoever in this respect, it is important to appreciate that this lawsuit is not about a particular or paradigmatic scam, draining or threatening the public purse in any such ways.

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[30] U.S. Bureau of the Census. Current Population Reports, Special Studies, P23-190, *65+ in the United States*. U.S. Government Printing Office, Washington, DC, 1996.

[31] U.S. Bureau of the Census, 1993 Press Release, *Nursing Home Population Increase in Every State*, CB93-117.

Mr. and Mrs. Cleary represent those aging middle class married couples faced with the huge costs of institutionalization, precisely the segment of society that Congress intended to aid through the passage of the spousal impoverishment provisions. By inclusion of section (e)(2)(C), Congress provided additional aid to those community spouses with limited income. Senator Mitchell introduced the Senate Amendment containing the proposed spousal legislation with the following explanation:

> The amendment will also protect one-half of accumulated assets of community spouses with a minimum of $12,000 and a ceiling of $48,000 [$60,000 at enactment and adjusted each year for inflation]. Upward adjustments in assets protection will be available to community spouses who have less than $750 per month [$1,500 at enactment and adjusted each year] in income but may have assets that can generate income up to that amount.

133 Cong.Rec. 29,356 (1987)(emphasis added). His words permit no doubt that Congress envisioned a mechanism by which community spouses with limited income could retain resources in an amount that would raise their own monthly income to an acceptable level.

Petitioners respectfully urge this Court to rectify the court of appeals decision that allows the State of New Jersey, and other jurisdictions which have followed its path, to subvert the intent of Congress and further victimize the elderly, mostly female, class of community spouses across the country.

III. THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN ITS INTERPRETATION OF THE FEDERAL STATUTE.

As correctly framed by the court of appeals, "To resolve this dispute, we must interpret 'community spouse's income' as used in subsection (e)(2)(C)" *Cleary*, 167 F.3d at 806.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 557-558 (1990). Courts presume that Congress expresses its legislative intention through the ordinary meaning of the words it chooses and unless the statutory language is ambiguous, the plain meaning of the words ordinarily prevails. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Disregarding the plain language of section (e)(2)(C) and well-settled canons of statutory construction, the court of appeals declared:

> the statute is complex and contains many interrelated provisions that make it impossible to attach a plain meaning to provisions in isolation. As such we find the definition of 'community spouse's income' to be ambiguous within the context of subsection (e)(2)(C).

Cleary, 167 F.3d at 807.

Can it be that the decision of the court of appeals stands for the proposition that the ordinary meaning of words cannot be assumed in complex statutes and, even more troublesome, that complexity somehow is synonomous with ambiguity?

This Court has reviewed complex statutes with interrelated provisions, such as the Internal Revenue Code, the Employment Retirement Income Security Act (ERISA), and the Bankruptcy Code without abandoning well-settled canons of construction. Regardless of complexity, the Supreme Court has declared, "In our view, the plain language of the Bankruptcy Code and ERISA is our determinant." *Patterson v. Shumate*, 504 U.S. 753(1992). The spousal impoverishment provisions require similar fortitude.

Ironically, New Jersey initially recognized the clarity of Congress's words, and proceeded to enact regulations to make an end-run around the resource first rule. In order to impose an income first approach, New Jersey altered the language of the federal statutory section, enacting the following regulation:

> If either member can establish at the fair hearing that the income generated by the community spouse's share of the couple's resources is inadequate to raise the community spouse's income (together with the community spouse maintenance deduction) to the maximum authorized level, additional resources (beyond the community spouse's share as established at N.J.A.C. 10:71-48) may be set aside for the community spouse.

N.J.A.C. 10:71-5.7(d)(emphasis added).

Justice Scalia's words in *Patterson v. Shumate*, 504 U.S. 753, 766 (1991)(concurring opinion) are brought to mind: "When the phrase 'applicable nonbankruptcy law' is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for 'state law' is mystifying." It is equally mystifying that the words "community spouse's income" should be thought to be a synonym for "community spouse's income and institutionalized spouse's income" by the district court and court of appeals considering Cleary.

However, Petitioners need not rest on a "plain meaning" analysis alone. The district court framed the statutory construction issue as follows:

> [a]statute must be read as a whole; words depend upon context; 'they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.

Cleary v. Waldman, 959 F. Supp. 222, 228-229 (D.N.J. 1997). Looking at the spousal impoverishment provisions as so much porridge, the district court lost sight of the statutory scheme, which further supports the resource first method. The sequence of steps in the course of the Medicaid application must be understood:

1. The standard spousal share is computed "at time of institutionalization." 42 U.S.C. § 1396r-5(c)(1)(A).

2. Either spouse may request a fair hearing to revise the community spouse resource allowance under section (e)(2)(C) "if an application for benefits has been made" 42 U.S.C. § 1396r- 5(e)(2)(A). This is part of the eligibility determination. It is critical that the community spouse resource allowance be determined sufficiently in advance of eligibility, so that more resources than required are not applied for the support of the institutionalized spouse.

3. The determination of the income of the institutionalized spouse and of the community spouse for purposes of establishing a community spouse income allowance is a post- eligibility determination. 42 U.S.C. § 1396r-5(b)(2). Prior to eligibility, no differentiation is made between the income and resources of the institutionalized spouse, since the nursing home is being paid privately. Only after eligibility is the income of the institutionalized spouse required to be used for his support, less a $30 per month personal needs allowance and a community spouse income allowance, if applicable.

4. The deduction of a spousal income allowance from the institutionalized spouse is a post-eligibility process, which may occur many months after the community spouse resource determination. 42 U.S.C. § 1396r-5(d)(1).

No justification for a deviation from a plain reading and progressive application of the statutory steps set forth in the admittedly complex statute exists. In these provisions, no ambiguities hinder the traditional rules of statutory construction. No conflict is present between the ordinary meaning of the words at issue and the primary legislative purpose of ameliorating spousal impoverishment. Indeed, that goal is

best served by construing the statute to mandate a resource first method.

CONCLUSION

The fate of the aging mothers and grandmothers, and to a far lesser extent, the fathers and grandfathers, of most middle-class Americans rests with the High Court in determining whether to grant certiorari and hear the appeal in *Cleary*. This Court alone has the opportunity to restore the intent of Congress in enacting the spousal impoverishment provisions of the Medicaid statute, by correcting a gross yet insidious error in the calculation of spousal allowances upon which the spouses of nursing home patients must live out their final years. In their pronouncements that either income first or resource first are reasonable and acceptable alternatives, the *Cleary* opinions not only injure community spouses in New Jersey, but in other states as well, which are now instructed that they may opt for income first methodology. The echoes of *Cleary* have already resounded in New York and New Hampshire where the changeover to income first is occurring. The damage to the Congressional plan to create a "uniform national spousal protection policy that applies in all States" appears complete as the *Cleary* message is disseminated.

For the foregoing reasons, Petitioners respectfully and earnestly pray this Honorable Court grant certiorari and hear the appeal of the *Cleary* appellants and the class which they represent.

Respectfully submitted,
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No. 97-5145

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,
Appellants,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES; VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES; NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,
Intervenors-Defendants in District Court.

January 27, 1998, Argued
February 8, 1999, Filed

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JUDGES: Before: SCIRICA, ROTH and RENDELL, Circuit Judges.

OPINIONBY: ROTH

OPINION: OPINION OF THE COURT

ROTH, Circuit Judge.

In this appeal we must decide if New Jersey's implementation of a portion of the Medicare Catastrophic Coverage Act ("MCCA" or the "Act") violates Federal law. Specifically, we must determine whether New Jersey may employ an "income-first" approach, rather than a "resource-first" approach, when determining Medicaid eligibility for a spouse who is institutionalized in a long-term care facility.

I. FACTS

Thomas and Carolyne Cleary, representing themselves and a class of persons similarly situated, sued the New Jersey Department of Health Services to enjoin application of its "income-first" rule. They contend that the New Jersey rule violates the MCCA when it attributes a portion of Thomas Cleary's income to his wife (income-first method) instead of allowing the couple to dedicate more of their resources to Carolyne Cleary's support (resource-first method). The Clearys argue that the Federal statute mandates a "resource-first" approach and that the New Jersey rule is an impermissible construction of the Act. In denying the Clearys' motion for injunctive relief, the District Court held that the income-first method is a permissible interpretation of the MCCA.

When the Clearys brought this action, Thomas Cleary was 79 years old and suffering from Parkinson's disease and dementia. On November 21, 1995, Thomas entered a long-term care facility in New Jersey. A year later, Carolyne Cleary sought Medicaid benefits on behalf of her husband and, pursuant to the Act, requested an assessment of the couple's assets by the Passaic County Board of Social Services. The board determined that the Clearys' total resources had been worth $ 240,000 at the time of Thomas'

institutionalization and assessed the then-current value of their assets as $ 180,000.

Under the Spousal Impoverishment Provisions ("SIP") of the MCCA, 42 U.S.C. § 1396, et seq., several steps are taken when a couple applies for Medicaid benefits to cover the care of a spouse who has been institutionalized. First, the state must calculate the total value of the couple's resources and allocate a share of the resources to each spouse. 42 U.S.C. § 1396r-5(c)(1). The amount allocated to the community spouse is called the Community Spouse Resource Allowance ("CSRA").[1] This amount then need not be spent for the care of the institutionalized spouse.

The income generated from the CSRA, along with the community spouse's other income, such as social security, makes up the community spouse's Minimum Monthly Maintenance Needs Allowance ("MMMNA"). The MMMNA is a level of income which has been estimated by the state as necessary to permit the non institutionalized spouse to live independently in the community. If either spouse is dissatisfied with the CSRA, he or she may request a "fair hearing." 42 U.S.C. § 1396r-5(e). The Clearys challenge New Jersey's method of revising the CSRA when it, along with the community spouse's other sources of income, is insufficient to meet the MMMNA.

The issue that divides the parties to this appeal is the question of what constitutes the community spouse's other sources of income. According to the Clearys, the Act provides that any shortfall between the MMMNA and the amount available to the community spouse as income is to be made up by the substitution of another CSRA, i.e., a larger portion of the couple's joint resources is to be attributed to the community

spouse. The income from such a reallocated amount, along with the community spouse's other income, should then be sufficient to meet the MMMNA. This is the "resource-first" approach. However, in New Jersey, before reformulating a CSRA with a larger share of resources, the fair hearing officer will consider a contribution of income from the institutionalized spouse to make up the shortfall between the MMMNA and the community spouse's other income. This is the "income-first" approach.

At the time she applied for Medicaid benefits for her husband, Carolyne Cleary was informed that Thomas was ineligible due to the couple's excess resources. Therefore, the Clearys were required to "spend down" their resources below a certain level before they could become eligible for Medicaid. Prior to the MCCA, an individual had to spend down all his or her resources before eligibility. The MCCA altered this by providing a protected spousal share of resources for the non-institutionalized or "community" spouse.

Pursuant to the Act, New Jersey determined that Carolyne Cleary was entitled to $ 1,524.50 per month as her MMMNA. At the time of the assessment, Mrs. Cleary's total monthly income was $ 828.25 ($ 516.50 in social security payment and $ 311.75 in interest from her CSRA). Thus, her income fell short of her MMMNA by $ 696.25.

Under New Jersey's income-first approach, this shortfall should be remedied by taking a portion of Thomas Cleary's income to be included as part of Carolyne Cleary's. Only after this step, will New Jersey look to other assets of the Clearys to augment Carolyne Cleary's income. The Clearys contend that this method does not conform to the provisions of the

Act and that Thomas' income cannot be transferred to Carolyne. The Clearys assert that New Jersey must make up the MMMNA shortfall by allocating a larger portion of the couple's resources to Carolyne's CSRA.

The Clearys filed suit in the District Court seeking injunctive relief from application of the income-first rule. The District Court denied their motion and granted motions to intervene by the New Jersey Association of Health Care Facilities and the New Jersey Association of Nonprofit Homes for the Aging.[2]

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction over this action pursuant to 42 U.S.C. § 1983 and 18 U.S.C. § 1331. The Clearys filed an interlocutory appeal from the District Court's denial of their motion for a preliminary injunction. We have jurisdiction of this appeal pursuant to 28 U.S.C. § 1292(a)(1).

We review the denial of a preliminary injunction for an abuse of discretion. However, the District Court's findings of fact are reviewed under a clearly erroneous standard. New Jersey Hosp. Ass'n v. Waldman, 73 F.3d 509, 512 (3d Cir. 1995). After applying the same standard as the District Court, we will find an abuse of discretion only upon concluding that the District Court's view was contrary to reason. U.S. v. A.R., 38 F.3d 699 (3d Cir. 1994).

III. DISCUSSION

The Clearys contend that New Jersey's income-first rule violates the MCCA because it requires couples to allocate income from the institutionalized spouse for the maintenance

of the community spouse, rather than designating a further portion of the couple's resources to create income for the community spouse. In effect, New Jersey requires couples to keep a greater portion of their resources available for "spend down" on medical care, thereby postponing Medicaid eligibility.

The Clearys argue that this method of revision violates both the letter and the spirit of the MCCA. We conclude that the MCCA, as interpreted by the federal and state agencies charged with its administration, grants states the discretion to employ either an income-first or a resource-first method when revising the CSRA. We will, therefore, affirm the decision of the District Court.

Because this appeal turns on the interpretation of a Federal statute, we will first examine the language of the statute and the context in which this particular dispute arises. Medicaid was established in 1965. While it is often thought of as providing medical care only for the indigent, it also provides coverage for the aged "whose income and resources are insufficient to meet the costs of necessary medical services" including nursing home care. 42 U.S.C. § 1396, et seq.

Medicaid is a cooperative federal-state venture through which the states operate programs of their own design. These programs must, however, be consistent with federal standards and regulations. 42 U.S.C.A. § 1396a(a)(1-5), (a)(10)(A, C), (a)(13)(B), (a)(17). The Federal agencies responsible for administering the Act, the Health Care Financing Administration ("HCFA") and the Department of Health and Human Services ("HHS"), have not adopted formal regulations interpreting the specific provisions at issue here. Rather, these agencies have left it to the states to decide

whether to consider an institutionalized spouse's income or resources in making adjustments to the standard resource allowance for community spouses. At the state level in New Jersey, it is the Division of Medical Assistance and Health Services (DMAHS) and the New Jersey Department of Human Services (DHS) which administer Medicaid. N.J.S.A. 30:40D-4.

In order to be eligible for Medicaid, a person's available income and resources may not exceed certain limits. Persons seeking eligibility for Medicaid benefits must "spend down" their available assets to the prescribed limits before becoming eligible. 42 U.S.C. § 1396 (a)(10). Prior to 1988, these eligibility rules forced couples to spend down the entirety of their resources in order for one of them to qualify for Medicaid. This resulted in the virtual impoverishment of the spouse who remained in the community.

In 1988, Congress enacted the MCCA, H.R. 2470, 100th Cong., 1st Sess., 102 Stat. 683 (1988). The chief purpose of the MCCA was to end the "pauperization [of the community spouse] by assuring that [she] has a sufficient -- but not excessive -- amount of income and resources available" while the other spouse is institutionalized. H.R. Rep. No. 105 (II), 1988 U.S.C.C.A.N. at 888. The goal of the MCCA was to provide sufficient income and resources for the community spouse while also ensuring that a fair share of the couple's resources were employed for the care of the institutionalized spouse. Through its Spousal Impoverishment Provisions, the MCCA set aside a protected level of income and resources for the community spouse. This amount is "protected" since it is not included when determining the institutionalized spouse's eligibility for Medicaid and it need not be "spent down" on the institutionalized spouse's care.

Because Medicaid serves the purpose of providing necessary medical services for both the indigent and the elderly, a related goal of the MCCA is to preclude couples who possessed substantial resources from qualifying for Medicaid. By sheltering a portion of their shared resources in trusts or in the community spouse's name, a couple might appear to have fewer resources, making them eligible for Medicaid. The 1988 Act curbed this sheltering practice by attributing certain amounts of the couple's overall resources to each spouse for eligibility purposes. The MCCA seeks to achieve a balance between spousal impoverishment and apportioning medical costs appropriately. It does this through a series of complex and interlocking provisions.

The statutory provision at issue in this case is § 1396r-5(e)(2)(C) of the Spousal Impoverishment Provisions of the MCCA. This section governs revisions to the resources allotted to the community spouse.

> REVISION OF COMMUNITY SPOUSE RESOURCE ALLOWANCE. -- If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)(2)(C) (emphasis added).

We must determine what constitutes the "community spouse's income" within subsection (e)(2)(C). The Clearys contend that only Carolyne's personal income (for instance, her social security check) may be considered for this purpose and that the MCCA mandates a transfer of the couple's resources in an amount sufficient to generate income to make up any shortfall. New Jersey argues that, prior to a transfer of any additional resources to meet the community spouse's needs, the MCCA permits the state to consider any income the institutionalized spouse may transfer to the community spouse.

States have adopted different methods of implementing the SIP. Some use a resource-first method; others, like New Jersey, an income-first approach. Under the latter method, adjustments can be made to resources only after taking into account income transferred from the institutionalized spouse. When a hearing officer considers the sufficiency of the CSRA to meet the community spouse's MMMNA, the hearing officer may consider as part of the "community spouse's income" a contribution of the institutionalized spouse's income. The New Jersey statute provides for this in the following language:

> Post-eligibility treatment of income: institutionalized individuals:
>
> (d) When the institutionalized individual's income is insufficient to provide the maximum authorized deduction for the community spouse, either the institutionalized spouse or the community spouse can request a fair hearing in accordance with the N.J.A.C. 10:71-8.4. If either member can establish at

> the fair hearing that the income generated by the community spouse's share of the couple's resources is inadequate to raise the community spouse's income (together with the community spouse maintenance deduction) to the maximum authorized level, additional resources (beyond the community spouse's share as established at N.J.A.C. 10:71-48) may be set aside for the community spouse. The amount of resources to be set aside shall be that amount that is determined sufficient to generate sufficient income to raise the community spouse's gross income to the maximum authorized level.

N.J.A.C. 10:71-5.7(d).

The Clearys maintain that this statutory language which permits the transfer of income from the institutionalized spouse to make up part of a "community spouse maintenance deduction" contravenes the plain language of the MCCA. The Clearys contend that the MCCA follows the "name on the check" rule. Following this approach, they assert, income of the institutionalized spouse cannot be considered "community spouse's income" for purposes of subsection (e)(2)(C).

To resolve this dispute, we must interpret "community spouse's income" as used in § 1396r-5(e)(2)(c). While the Federal agencies which administer the Act have not adopted formal regulations, neither have they remained silent. Both HCFA and HHS have stated in policy memoranda and letters that states may adopt either the income-first or the resource-first method and that subsection (e)(2)(C) permits consideration of potential income transfers from one spouse

to another. In addition, these agencies have stated that the resource-first method, although permissible, is not mandatory.[3] Nevertheless, the Clearys argue that New Jersey has run afoul of Federal standards in its implementation of the Act.

In considering this question, we will look first at the statute and, using traditional tools of statutory construction, determine if Congressional intent is apparent. If we can do so, we must give effect to that intent. Reich v. Local 30, IBT, 6 F.3d 978, 986, citing, I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446-48, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987), and Chevron U.S.A , Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). But, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843.

We agree with the District Court that the statute is complex and contains many interrelated provisions that make it impossible to attach a plain meaning to provisions in isolation. As such we find the definition of "community spouse's income" to be ambiguous within the context of subsection (e)(2)(C). As a result, we must go on to examine the purposes of the Act and the interpretation proffered by the administering agencies. Because, however, the views of the administering agencies in this case are not made in formal regulations, we are confronted with another question: What level of deference should we grant to the agency interpretation?

Where an agency has promulgated rules pursuant to notice and comment procedures, the Supreme Court has held that

courts must defer to the agency's reasonable interpretation. Chevron, 467 U.S. at 844. The task becomes more complicated when the agency's interpretation is contained in informal views or guidelines outside the course of notice and comment procedures. We have questioned what degree of deference, if any, to afford an agency's views in this context. Reich, 6 F.3d at 986; E.I. du Pont de Nemours & Co. v. C.I.R., 41 F.3d 130, 135 (3d Cir. 1994), aff'd sub nom. Conoco, Inc. v. C.I.R., 42 F.3d 972 (5th Cir. 1995); Sekula v. F.D.I.C., 39 F.3d 448, 453 (3d Cir. 1994).

Since the Supreme Court's decision in Chevron , courts have deferred to an agency's reasonable interpretation of a statute over which that agency has been granted administrative and lawmaking authority. Chevron, 467 U.S. at 844. In the wake of Chevron, a great body of commentary has emerged regarding the extent of this deference. See, Sunstein, "Law and Administration After Chevron", 90 Colum. L. Rev. 2071 (1990). Despite dispute as to Chevron's scope, the principles announced there center on the institutional competence of agencies to make factual determinations and resolve issues of policy. As the Supreme Court stated in Chevron, where a statute is ambiguous and Congressional intent is not clear, agencies promulgating reasonable interpretations, while exercising their delegated rulemaking authority, will be granted deference to those reasonable interpretations.

The agency views at issue here are not, however, formal regulations promulgated pursuant to notice and comment rulemaking. In such cases, we have questioned whether Chevron deference applies. Therefore, we must determine the degree of deference, if any, that is warranted.

The Supreme Court has stated that, where an administrative agency's interpretation is registered in informal views, as long as that agency has a delegated authority to administer the statute and the views are made "in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge", then those views warrant some deference. Skidmore v. Swift & Co., 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161 (1944). In Skidmore, the Court decided that employees of a packing plant were entitled to overtime pay for night-time duty even though most of the time was spent idle. In so holding, the Court relied on the informal views of the Fair Labor Standards Act Administration that had determined that waiting during night duty was akin to work. The Court decided that, although the Administration's views were not contained in formal rules and "while not controlling upon the court by reason of their authority, they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. How much guidance and weight depends, however, on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Id.

Because the Supreme Court's decision in Skidmore precedes Chevron by more than 40 years, the question arises whether chevron's deference principle with regard to legislative rules (those made pursuant to notice and comment procedures) replaces the reasoning of Skidmore. We have noted repeatedly that Skidmore and its progeny were not expressly overruled by Chevron. See Reich, 6 F.3d at 987; Sekula, 39 F.3d at 453; International Raw Materials, Ltd. v. Stauffer Chemical Co., 978 F.2d 1318 n.9 (3d Cir. 1992).

We have tested interpretative rules against the principles enunciated in Skidmore and determined that, if an agency has been granted administrative authority by Congress for a statute, its interpretation -- despite arising in an informal context -- will be given deference as long as it is consistent with other agency pronouncements and furthers the purposes of the Act. n4 Most recently, in Elizabeth Blackwell Health Center for Women v. Knoll, we concluded that interpretive rules by an agency with lawmaking authority (as opposed to legislative rules) will get deference even if the agency's interpretation is not made pursuant to that lawmaking authority. 61 F.3d 170 (3d Cir. 1995) (directive from HCFA giving guidance to states about Medicaid plans is an interpretative rule and gets deference when reasonable).

The interpretations that form the basis for New Jersey's implementation in this case are contained in informal views from the agency with the statutory mandate to administer the Act. The case law clearly provides that these views will receive some deference by the court if they are consistent with the plain language and purposes of the statute and if they are consistent with prior administrative views.

In this case, we have an ambiguous statute as well as agency views that are informal and not made subject to notice and comment procedures. But the agency involved has delegated authority under the statute to administer the Act and therefore satisfies the requirement that a precondition to Chevron deference is a congressional delegation of administrative authority. See Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 649, 108 L. Ed. 2d 585, 110 S. Ct. 1384 (1990). Under the Skidmore analysis outlined above, we must probe further to determine whether the interpretation is consistent and contemporaneous with other pronouncements of the agency

and whether it is reasonable given the language and purpose of the Act. We have made such an assessment, reviewing the above factors in the order that they are made in the Clearys' arguments. For the reasons we state below, we conclude that the informal views of the agencies should be given deference.

The Clearys' primary contention is that the granting to states of discretion to adopt an income-first rule runs contrary to the statute's plain language. The crux of their argument is that "income" as used in the statute is confined to the "name on the check" rule. We disagree.

To support their position of what constitutes Carolyne Cleary's income, the Clearys cite to the SIP definition of income in 42 U.S.C. § 1396r-5(b)(2). The Clearys contend that under the income provisions in subsection (b)(2), no income from the institutionalized spouse should be deemed available to the community spouse as this would violate subsection (b)(2)'s "name on the check rule."

Subsection (b) does indeed incorporate the "name on the check" rule. Basically, any income payment made solely in a spouse's name (either the institutionalized or the community spouse) is considered income available only to the named spouse. If an income payment is made in the names of both spouses, half of it is considered available to each spouse.

Why the Clearys argument fails lies in the fact that the income provisions of § 1396r-5(b)(2) do not apply to a revision of resources under § 1396r-5(e)(2)(C). Subsection (b) applies "in determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d)." And subsection (d), § 1396r-5(d), to which subsection

(b) refers, is entitled "Protecting Income for Community Spouse." Subsection (d) defines the allowances which will be offset from the income of the institutionalized spouse before that income will be applied to pay for institutionalization costs. One such allowance is the community spouse monthly income allowance -- to the extent that it comes from the income of the institutionalized spouse. Subsection (d) defines the community spouse monthly income allowance as the difference between the MMMNA and whatever income the community spouse generates on her own. Subsection (b) then computes the community spouse's MMMNA, which, as we describe above, is designed to keep the community spouse living above the poverty line. This statutory language makes it clear that a certain portion of the community spouse's income may come from the income of the institutionalized spouse.

In addition, some, or all, of the community spouse's self-generated income will be income from the CSRA. The couple may not, however, be happy with the amount of the CSRA, either as originally computed or as changed circumstances may affect it. Subsection (e)(2)(C) then provides for a revision of the CSRA if either spouse establishes that the CSRA is inadequate to raise the community spouse's income to the MMMNA. Nevertheless, in computing the community spouse's total income, one cannot focus only on the income generated by the CSRA and ignore the other sources of income defined in subsections (b) and (d).

We agree with the District Court that to conflate the detailed provisions dealing with income in subsection (d) with the resource revisions procedure addressed in subsection (e) would run contrary to the statute. The purpose of subsection

(d) is to make available to the community spouse so much of the institutionalized spouse's income as is necessary to ensure her monthly need. We agree that "it would be anomalous to construe (e)(2)(C) in such a manner as to exclude the institutionalized spouse's income from the calculation." Cleary v. Waldman, 959 F. Supp. 222, 232 (D. N.J. 1997). The reading advanced by the Clearys would make (d) superfluous.

Moreover, the Act does make an explicit reference to a transfer of income from one spouse to another. In determining the amount of the institutionalized spouse's income that will be applied to the payment of the costs of the institution, subsection (d) provides that, first, the community spouse's monthly income allowance, to the extent that it is paid by the institutionalized spouse, will be deducted from the institutionalized spouse's income. This deduction will be made before the institutionalized spouse must contribute to medical costs. This language in subsection (d) demonstrates that the "name on the check "principle will not prevent allocation under the SIP of the institutionalized spouse's income for the needs of the community spouse.

The Clearys argue, however, that the plain language of the MCCA guarantees the community spouse an "adequate amount of resources to provide the MMMNA." They contend that this means that a greater share of the couple's resources should go to the community spouse in the event she can not meet her monthly need. The Clearys rely on language in subsection (e) that provides that, if either spouse is dissatisfied with the CSRA and can establish that the amount of income generated by it for the community spouse is inadequate to meet the community spouse's MMMNA, "there shall be substituted, for the [CSRA] under subsection (f)(2)

of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance." § 1396r-5(e)(2).

The Clearys rely on the words "substituted" and "an amount adequate" for their argument that any shortfall between the community spouse's income and the MMMNA must be made up by allocating more income from a larger share of resources to generate more income.

This argument ignores the import of the fair hearing process embedded within the Act. Subsection (e)(2)(A) permits a "fair hearing" if either spouse is dissatisfied with the determination of any one of the five components that create the community spouses's income: the community spouse monthly income allowance (from the institutionalized spouse), the amount of monthly income otherwise available to the community spouse, the computation of the spousal share of resources, the attribution of resources, and the determination of the CSRA. Subsection (e)(2)(B) provides for the revision of the MMMNA. Subsection (e)(2)(C) then provides for a revision of the CSRA if either spouse "establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance . . .."

The fact that the "fair hearing" subsection, (e)(2), starts in (e)(2)(A) with a recitation of the five components that makeup the community spouse's income would indicate that a revision of one of those components, the CSRA, should be made only with a consideration of the other four. The five elements are interrelated and an adjustment of one will affect

the other four. For this reason, a spouse may not be able to demonstrate an inadequacy of the CSRA, pursuant to (e)(2)(C), if a larger community spouse monthly income allowance is possible.

This interpretation of the language of subsection (e)(2) is consistent with the legislative history. Congress intended in subsection (e)(2)(C) that an "adequate" amount of resources to provide for the monthly need would occur after taking into account any other income attributable to the community spouse. House Conf. Rep. No. 100-661, at 256, reprinted in 1988 U.S.C.C.A.N. 923,1043.

The Clearys also contend, however, that New Jersey's income-first rule violates the purpose of the Act. They assert that the Act was designed with people like themselves in mind -- those who will exhaust their retirement savings by paying for long-term care expenses.

The Clearys are correct that, with the Spousal Impoverishment Provisions, Congress was addressing the problem of scarce resources for health care expenditures for the elderly. The legislative history refers to the ballooning costs of health care for the elderly and the inadequacy of the existing Medicare structures to deal with them.[5] The purpose of the MCCA was to address these increasing costs and the disparity between what Medicare would and would not pay for. H.R. No. 100-105(I), at 8 (1988), reprinted in 1988 U.S.C.C.A.N. 803, 810.

An important Congressional consideration at the time the MCCA's adoption was the dual problems of scarce Medicare and Medicaid resources and an aging population. But it was also evident that Congress did not intend the MCCA to be a

final solution. The bill directs the Secretary of Health and Human Services to conduct research on long-term care delivery. Congress apparently recognized the problem of long-term care financing was in its nascent stages, and that Medicaid, the sole source of financing for long-term care, must cover a broad range of income groups.

> The leading cause of financial catastrophe among the elderly is the need for long-term care, especially the need for nursing home placement. The expense of nursing home care which can range from $ 2,000 to $ 3,000 per month or more-has the potential for rapidly depleting the lifetime savings of all but the wealthiest.

Id. at 888.

Indeed, Medicaid is not just for the poorest among us. It must be available to assist an ever-increasing number of the medically needy. Granting discretion to the states to implement the Act according to their resources, priorities, and populations furthered this purpose by preserving as many Medicaid resources as possible.

The Clearys maintain, however, that the legislative history supports a resource-first approach. Again, we disagree. The Spousal Impoverishment Provisions originated in the House and contained no resource revision provision. Under the House bill, the only sources of income available to meet the community spouse's monthly need were the community spouse's own income, (e.g., social security), any income generated by the CSRA, and any transfers of income from the

institutionalized spouse (e.g., the community spouse monthly income allowance).

The Senate bill added a provision reducing the resources available to the institutionalized spouse by an amount necessary to achieve the monthly need of the community spouse. The Senate did not, however, consider a transfer of income from the institutionalized spouse. The Senate bill also included a provision for a hearing to increase the MMMNA or the CSRA if either was inadequate to support the community spouse. The Clearys argue that the Senate bill accurately reflects the will of the Congress and the meaning of the MCCA.

The problem with this argument is that the Conference Committee adopted neither the House nor the Senate versions of the bill. Unlike the House bill, the Conference Committee provided an adjustment to the resource allowance in order to meet the community spouse's monthly need. But, unlike the Senate bill, the Conference Committee did not achieve this adjustment by shifting more resources toward the community spouse. Instead, the Conference version provided for the fair hearing process in subsection (e)(2), which permits a reconsideration of any one of the five components of the community spouse's income in subsection (e)(2)(A) and allows a revision of the CSRA in subsection (e)(2)(C). As we discuss above, subsection (e)(2)(C) should be read as a part of the entire "fair hearing" subsection.

The Clearys seize upon the inclusion of the fair hearing provision as an implicit adoption of the Senate's view that more resources should go to the community spouse in the event of a shortfall. But, this argument fails for the reasons we state above. Indeed, the Conference Committee gave no

indication of an intent to augment the CSRA before increasing the community spouse monthly income allowance. The Conference Report speaks to the responsibility of the state to allow the community spouse to retain an "adequate" amount of resources to provide for her monthly need after "taking into account any other income attributable to the community spouse." House Conf. Rep. No. 100-661, at 265, reprinted in 1988 U.S.C.C.A.N. 923, 1043.

We are mindful of the daunting crisis which long-term care costs pose even to those who have saved for their retirement. The prospect of a growing elderly population in America, who are impoverished by these costs, prompted Congress to enact the Medicare Catastrophic Coverage Act. But, the MCCA creates a federal state cooperative venture for the provision of Medicaid assistance to the medically and categorically needy. The statute permits states to implement their own programs as long as they do so in accordance with the federal statute and its applicable regulations.

The Health Care Financing Administration and the Secretary of the Department of Health and Human Services have clearly stated their views, albeit in policy letters, that the states should have the discretion to employ either an income-first or a resource-first method. As we have shown, this policy conforms to the language of the statute, to its legislative history, and to the purpose for which it was enacted. Moreover, these agencies have statutory authority to administer the Act, and their policy is a reasonable interpretation consistent with the plain language and stated purposes of the statute. We will, therefore, grant deference to this view.

IV.

[1] The CSRA is the greatest of (a) $ 12,000, (b) the lesser of one-half total joint resources or $ 60,000, (c) an amount established pursuant to a fair hearing under subsection (e)(2) or (d) and amount transferred under court order. 42 U.S.C. § 1396r-5(f)(2)(A).

[2] The Clearys also sought declaratory and injunctive relief in the District Court on the issue of their right to be notified under the Act of the requirements and procedures for eligibility for Medicaid. The District Court denied injunctive relief on this issue as well. The Clearys, however, are not appealing the notice issues.

[3] See HCFA State Medicaid Manual, HCFA-Pub. 45, § 3262.3, interpreting the Spousal Impoverishment Provisions and indicating that states should adopt an income-first approach. See also memoranda to states indicating that either resource-first or income-first may be used, HCFA Memorandum from Medicaid Bureau Director Sally Richardson (March 1994), Joint Appendix ("JA") at 99-100; HCFA Letter to Pennsylvania Department of Public Welfare (April 1994), JA at 101-103; Chicago Regional State Letter 22-94 (July 1994), JA at 103-04; Letter for Donna E. Shalala to George V. Voinovich (March 1996), JA at 105.

[4] See Sekula, 39 F.3d at 453 (Resolution Trust Corporation interpretation made in context of legislative rulemaking gets deference); and, E.I. du Pont de Nemours & Co., 41 F.3d at 135 (if the secretary has delegated rule making authority and there has been no prejudice from delay between enactment of the statute and interpretation it will receive deference if reasonable.)

[5] "Greater life expectancy merely postpones the inevitable need for care of chronic and terminal illnesses....Expenditures for personal health care services for the elderly nearly tripled between 1977 and 1984, rising from $ 43 billion to an estimated $ 120 billion." H.R. No. 100-105(I), at 8, reprinted in 1988 U.S.C.C.A.N. 803, 810.

CIVIL ACTION NO. 96-4774 (DRD)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THOMAS J. CLEARY by his next friend, Carolyne Cleary, and CAROLYNE CLEARY individually, on their own behalf and on behalf of all other persons similarly situated,
Plaintiffs,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES, LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, VELVET G. MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, and MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES,
Defendants.

COUNSEL: Appearances

For Plaintiffs: Feldman & Feldman, Marlton, NJ, By: Paul L. Feldman, Esq., Stephen A. Feldman, Esq., Ellen R. Wase, Esq., Beth Lovitch, Esq.

For William Waldman, Leonard Fishman, Velvet G. Miller and Mark Schiffer, Defendants: Peter Verniero, ATTORNEY

GENERAL OF NEW JERSEY, Trenton, NJ, By: Meredith Van Pelt, Deputy Attorney General. Charles A. Miller, Esq., Covington & Burling, Washington, D.C.

For New Jersey Association of Health Care Facilities, Intervenor: Fox, Rothschild, O'Brien & Frankel, Lawrenceville, NJ. For New Jersey Association of Non-Profit Homes for the Aging, Intervenor: Jonathan D. Weiner, Esq., Of Counsel, Jonathan D. Weiner, Esq., R. James Kravitz, Esq., Maureen E. Kerns, Esq., On the Brief, Dechert Price & Rhoads, Princeton, NJ, By: Bruce W. Clark, Esq., Kara W. Swanson, Esq.

JUDGES: DICKINSON R. DEBEVOISE, U.S.S.D.J.

OPINIONBY: DICKINSON R. DEBEVOISE

OPINION: OPINION

DEBEVOISE, SENIOR DISTRICT JUDGE

Plaintiff, Thomas J. Cleary, is an "institutionalized spouse" (as defined in 42 U.S.C. § 1396r-5(h)(1)) residing at The Health Center at Bloomingdale in Bloomingdale, New Jersey. Plaintiff, Carolyne Cleary, Mr. Cleary's wife, is a "community spouse" (as defined in 42 U.S.C. § 1396r-5(h)(2)) and resides in Butler, New Jersey.

The defendants are William Waldman, Commissioner of New Jersey Department of Human Services; Leonard Fishman, Commissioner of New Jersey Department of Health and Senior Services; Velvet G. Miller, Director of Division of Medical Assistance and Health Services; and Mark Schiffer, Director of Passaic County Board of Social Services.

Plaintiffs seek to represent a class composed of all persons who:

> (a) were, or in the future would be, admitted to New Jersey nursing facilities, as "institutionalized spouses" within the meaning of the Social Security Act, or were, are, or in the future would be "community spouses" within the meaning of the Social Security Act; and
>
> (b) did not, or in the future would not, receive, upon ad nission to the facility, both oral and written notice of the requirements and procedures for establishing eligibility for medical assistance, including the right to request an assessment and to establish an amount necessary to provide a minimum monthly maintenance needs allowance. There is a subclass of individuals, represented by Named Plaintiffs Thomas and Carolyne Cleary, who also:
>
> (c) were not, or in the future would not be, adequately or correctly notified of their right to increase the "community spouse resource allowance" as part of the Medicaid application process; and,
>
> (d) unnecessarily diminished, or in the future would unnecessarily diminish, needed income producing assets due to this lack of information; and subsequently

(e) were not, or in the future would not be, allowed to increase the "community spouse resource allowance," because of Defendant's impermissible and therefore unconstitutionally restrictive application of federal law.

In this action plaintiffs challenge the interpretation of portions of the Medicare Catastrophic Coverage Act of 1989 (the "MCCA"), 42 U.S.C. § 1396r-5, which provide for the allocation and distribution of income and assets between institutionalized and community spouses for the purpose of deciding if the institutionalized spouse is Medicaid eligible. Plaintiffs have moved for an order preliminarily enjoining defendants (i) from continuing practices which violate notice provisions of the Social Security Act 42 U.S.C. § 1396, et seq., and (ii) from continuing to implement New Jersey's "income first rule" when determining when an institutionalized spouse becomes Medicaid eligible.

Two organizations have moved to intervene. The New Jersey Association of Health Care Facilities (the "NJAHCF"), which includes among its members more than 200 of the State's 352 nursing facilities, and the New Jersey Association of Non-Profit Homes for the Aging (the "NJANPHA"), which is an association of more than 130 non-profit New Jersey facilities for the elderly. Each of these associations asserts that the relief plaintiffs seek would cause a significant reduction in monthly payments to them and subjects them to the risk of suits by residents of their facilities for restitution for past overpayments under the state regulatory structure which plaintiffs allege is unlawful.

I. The Intervention Motion

Both parties moving to intervene (referred to collectively as the "intervenors") are non-profit organizations which serve the interests of their constituent nursing homes. Each asserts that abandonment of New Jersey's income first regulations would have a devastating impact upon their members and would subject them to law suits by Medicaid recipients to recover payments made pursuant to the State's income first regulations,

The income first rule will be dealt with in more detail in subsequent parts of this opinion, but a brief description of its role in New Jersey's Medicaid program is necessary in order to understand the nature of the intervenors' interests.

The MCAA designates as the community spouses' minimum monthly maintenance needs allowance (the "monthly need") a sum sufficient to enable the community spouse to live independently in the community above the poverty level.

The MCAA also allows the community spouse to retain marital assets known as the community spouse resource allowance (the "resource allowance").

In the present case plaintiffs had combined assets of $ 248,428.80 at the time Mr. Cleary first entered a nursing home. The county agency handling his Medicaid application found that Mrs. Cleary's resource allowance was $ 76,740, based upon a formula authorized by the federal statute. It also found that her monthly need was $ 1,524.50, and that this would be provided by i) $ 516.50 which she received from Social Security, ii) $ 311.75 in the form of interest (at 5%) on her $ 76,740 resource allowance, and iii) $ 696.25 from her husband's income. Subsection (d) of MCCA provides in effect, that after the institutionalized spouse's eligibility is

determined, any deficit in the community spouse's monthly need will be applied to her from the institutionalized spouse's income before it is applied to the institutionalized spouse's medical care expenses.

When the county agency made this determination approximately $ 180,000 of plaintiffs' assets remained. the rest having been used for nursing home charges and other expenses. The institutionalized spouse, Mr. Cleary, would not be eligible for Medicaid until he had spent down the remaining assets to an amount equal to $ 2,000 plus $ 76,740 which would be payable to Mrs. Cleary as her resource allowance. While the spending down process continued Mr. Cleary would remain a private patient in his nursing home paying private patient rates of approximately $ 6,000 a month. When he became Medicaid eligible, the nursing homes would be required to accept the Medicaid reimbursement rate, an amount well below the costs of his care.

Plaintiffs contend that under subsection (e)(2)(C) of MCCA Mrs. Cleary was entitled to a resource allowance of $ 243,780 rather than $ 76,740. The subsection provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide

such a minimum monthly maintenance needs allowance.

It is plaintiffs' position that the $ 696.25 from Mr. Cleary's income cannot be counted as Mrs. Cleary's income when making the subsection (e)(2)(C) calculation, and that as a result her resource allowance must be increased by $ 167,040, an amount which, when invested, would produce income of $ 696.25 per month.

If Mrs. Cleary's total resource allowance were $ 243,780 ($ 76,740 plus $ 167,040), Mr. Cleary would be entitled immediately to Medicaid assistance, and during the period when he otherwise would have been paying the nursing home $ 6,000 a month the nursing home would have been paid the much lower Medicaid monthly rate.

Both intervenors assert that application of the resource first rule advocated by plaintiffs in place of the State's income first rule would have a devastating effect upon their member nursing homes and would inevitably have an adverse impact upon care for the institutionalized elderly in New Jersey.

In their complaint plaintiffs estimate that if the resource first rule were adopted approximately 10,000 New Jerseyans would become immediately Medicaid eligible, swelling the State's rolls and changing reimbursement received by nursing facilities from private payers rates to the Medicaid rate. The intervenors estimate that the financial impact would amount to approximately $ 66 million per year.[1]

Further, if it were held that the income first method is invalid, there is the prospect that persons such as the Clearys might seek reimbursement from their nursing homes for excessive

past payments. MCCA was implemented in 1989, and there is the spector of claims in the amount of $ 66 million for each year since that date.

NJAHCF includes among its membership more than 200 of the State's 352 nursing facilities. They are of a proprietary, non-profit and governmental structure.

NJAHPHA is a state-wide association of more than 130 non-profit facilities for the elderly serving more than 25,000 persons each year. Catholic, Jewish and Protestant organizations sponsor two-thirds of NJAHPHA's members, while county governments, fraternal organizations, private charities and other community groups serve the rest. Most of NJAHPHA's members are nursing facilities, but they also include assisted living facilities, continuing care retirement communities, residential health care facilities and independent housing.

By statute and regulation New Jersey's Medicaid nursing homes have an obligation to fill at least 45% of their beds with Medicaid patients, at a substantial loss per patient. To cover the loss the nursing homes must increase their rates to private patients. Presently the average private-pay census in the State's nursing facilities is 27% of the State's total nursing facility beds, with Medicaid patients occupying the balance. If the resources first rule were applied in New Jersey substantial numbers of private patients would immediately become Medicaid patients reducing even further the number of private-pay patients who have to carry the losses incurred as Medicaid patients. Further, in the future if spouses were able to shelter substantially more assets there would continue to be fewer private-pay patients who would have to shoulder an ever increasing share of nursing home costs.

The intervenors assert that they are entitled to intervene as of right pursuant to Fed.R.Civ.P.24(a), and that in any event they should be granted permissive intervention under Rule 24(b). Plaintiffs resist the motions asserting i) that the intervenors' estimates of the economic impact of a resource first rule are "grossly exaggerated", ii) that they lack a sufficient interest in the litigation and iii) that they lack standing.

I conclude that the intervenors have met the requirements of Rule 24(a). As party seeking to intervene must shows that:

> 1. Its application is timely;
>
> 2. It has a direct interest in the subject matter of the litigation;
>
> 3. Its interests may be affected or impaired as a practical matter, by the disposition of the action; and
>
> 4. Its interest is not adequately represented by any existing party.

Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir.), cert. denied, 484 U.S. 947, 98 L. Ed. 2d 363, 108 S. Ct. 336 (1987).

It is undisputed that the intervenors' application is timely.

Standing and a direct interest in the subject matter of the litigation are related concepts. An association has standing if i) its members would otherwise have standing to sue in their own right; ii) the interests it seeks to protect are germane to the organization's purpose; and iii) neither the claim asserted

nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977).

Individual nursing homes would have a right to intervene in this action. It affects their vital interests. Contracts which they have with private patients could be affected if plaintiffs' position prevails. They might find themselves subject to suits for restitution of payments which patients made while the State's income first rule was in effect. Further, the relief which plaintiffs seek in their Count I is an order directing the State to take regulatory action against nursing homes. Thus the individual members of the intervenors would have standing to intervene in their own right.

Obviously the interests which the intervenors seek to protect are germane to their organizational purposes - the financial well-being and the general effectiveness of their members. They can seek to protect their interests in this lawsuit without the participation of individual members. Thus the intervenors have standing and by the same token have a direct interest in this litigation.

The interests of the intervenors may well be affected or impaired as a practical matter by the outcome of this litigation. The consequences of a declaration that the State's income first policy violates MCCA have been described above. There would be immediate financial consequences and there would be a strong likelihood that individual nursing homes would be sued for reimbursement.

The present parties to the litigation are all governmental agencies. Many of their interests parallel those of the

intervenors' members. However, in some important respects they diverge. By virtue of the Eleventh Amendment the State defendants are immune from suits for money damages and have no incentive to consider the retroactive effect of a judgment. This could affect their litigation strategy and their strategy during possible settlement negotiations.

I conclude that the intervenors have met the requirements of Rule 24(a). Even if they were not entitled to intervene as of right, in the exercise of the court's discretion they should be permitted to intervene pursuant to Rule 24(b). Their claims and defenses have significant questions of law in common with those of the main action. Their presence would not delay the action or prejudice the rights of the parties. They are vital participants in the program to provide medical care to the elderly and to the indigent. Their perspective is an important one and should have a voice when issues critical to their well-being and to the well-being of the Medicaid program in New Jersey are being decided. Their motions to intervene will be granted.

II. The Facts

The historical facts as set forth in the complaint and as amplified by affidavits are not in dispute.

Mr. Cleary is 79 years of age and suffers from Parkinson's Disease with dementia. He was admitted to Morris Hills Multicare Center on or about November 21, 1995. On January 23, 1996 his family transferred him to the Health Center at Bloomingdale. Upon admission to the nursing home in 1995 he became an "institutionalized spouse" pursuant to the Social Security Act and his wife became a "community spouse." 42 U.S.C. § 1396r-5(h).

At the time of Mr. Cleary's 1995 admission the couple's combined "countable" resources (which excluded the value of the family home) amounted to approximately $ 248,428.80. Of this amount $ 48,340 was spent for Mr. Cleary's nursing home care through August of 1996.

In July 1996 Mrs. Cleary applied to the Passaic County Board of Social Services ("BSS") for Medicaid benefits on behalf of Mr. Cleary. She also requested that BSS prepare a resource assessment of the total value of the couple's joint resources at the time of Mr. Cleary's initial institutionalization.

On July 26, 1996 the eligibility worker assigned to the case informed Mrs. Cleary's counsel that the BSS planned to keep the file open for 180 days and refused to issue a resource assessment at that time. Upon being advised by counsel that BSS was required under New Jersey regulations to make an assessment and a Medicaid eligibility assessment upon request, BSS issued an assessment and denial of eligibility. Ultimately it determined that the couple's countable resources at the time of Mr. Cleary's initial institutionalization totalled about $ 240,000 (to which later discovered life insurance policies' cash surrender values aggregating $ 8,428.80 should be added). By the time of Mr. Cleary's subsequent application for Medicaid this amount had been reduced to approximately $ 180,000.

The BSS determined that Mrs. Cleary could retain a spousal allowance of $ 76,740 of the joint resources and that Mr. Cleary would have to spend the remaining non-exempt resources of approximately $ 103,000 down below $ 2,000 before he would be eligible for Medicaid.

Plaintiffs contend that the BSS incorrectly informed them that the amount protected for the community spouse was $ 76,740, because, in accordance with the statute, the community spouse resource allowance as at that date was i) $ 15,348, ii) an amount computed under a statutory formula - $ 76,740 in the present case, iii) an amount established pursuant to a fair hearing, or iv) an amount transferred under a court order. 42 U.S.C. § 1396r-5(f)(2)(A). For the reasons set forth below, plaintiffs contend that a fair hearing would have established that Mrs. Cleary's community resource allowance was greatly in excess of $ 76,740.

According to plaintiffs' calculations Mrs. Cleary receives a monthly social security payment of $ 516.50. Her spousal allowance of $ 76,740 would earn $ 311.74 in interest (assuming a 5% rate of return). Her monthly needs allowance is $ 1,524.50 (including excess shelter costs). This exceeds her total monthly income by $ 696.25 per month. According to plaintiffs they are entitled to an upward revision of the community spouse resource allowance pursuant to the provision of subsection (e)(2)(C) in an amount which will produce the additional $ 696.28. Assuming a 5% return, the income would be $ 167,040, which, together with the originally calculated spousal allowance would produce a total allowance of $ 243,780. The countable resources were $ 248,428, and Mr. Cleary would only have had to spend down $ 3,000 in resources before becoming eligible for Medicaid.

New Jersey has adopted the so-called "income first rule." Pursuant to this rule the hearing officer, in determining whether to allocate additional resources to Mrs. Cleary, would first consider whether a transfer of income from Mr. Cleary would enable her to meet the monthly need, given her income and the income from the $ 76,740 share of resources.

Mr. Cleary receives more than $ 1,000 per month in Social Security benefits, and, of course, pending medicaid eligibility he will receive whatever income his share of the unused countable resources produces. His Social Security benefits alone are sufficient to provide Mrs. Cleary with the additional income to which she is entitled both before and after he becomes entitled to Medicaid assistance. If Mr. Cleary dies before Mrs. Cleary, Mrs. Cleary's Social Security payments would increase from $ 526.50 to $ 1,101.50 and her total income would be $ 1,413.25, including the income generated by her standard resource allowance. This would be $ 111.25 short of her monthly need. The defendants assert that this is the short fall which should be addressed at a hearing pursuant to subsection (e)(2)(C).

Thus the principal issue in this case is whether New Jersey's income first regulation violates the Social Security Act.

III. Discussion

In order to obtain a preliminary injunction pursuant to Fed.R.Civ.P. 65 plaintiffs must establish that they have a reasonable probability of succeeding on the merits in the litigation and that they will be irreparably injured if a preliminary injunction is denied. Further the court must consider the harm to other persons from the granting or denial of the injunction, and the court must consider the public interest. Attention will first be directed to the likelihood of plaintiffs succeeding on the merits.

Plaintiffs note, correctly, that as at the applicable date the amount to be protected for Mrs. Cleary is the greatest of i) $ 15,348, ii) an amount computed under a statutory formula, i.e., $ 76,740, iii) an amount established pursuant to a fair

hearing, or iv) an amount transferred under a court order. 42 U.S.C. § 1396r-5(f)(2)(A). At the time of application for Medicaid benefits, only the countable resources in excess of the community spouses' protected share are considered available to the institutionalized spouse to pay for care. 42 U.S.C. § 1396r-5-(C)(2). Plaintiffs assert that in the present case the greatest of the four categories referred to in subsection (f)(2)(A) is the amount established pursuant to a fair hearing under subsection (e)(2)(C).

Subsection (e)(2)(C) provides that:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

At issue is what may be included in "the community spouse's income" within the meaning of subsection (e)(2)(C). The State contends that the statute permits it to consider any income which the husband can transfer to the wife to meet her needs before allowing the husband to transfer additional resources under subsection (e)(2)(C). The plaintiffs contend that only her personal income may be considered for subsection (e)(2)(C) purposes, and that the statute mandates a transfer of resources from the husband in an amount sufficient to generate income to make up any shortfall.

The Medicaid Act contains complex, interrelated provisions, and it would be foolhardy to impute a plain meaning to any of its provisions in isolation. A statute must be read as a whole; words depend upon context; "they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." Tate & Lyle, Inc. v. CIR, 87 F.3d 99, 104-05 (3d Cir. 1996). Thus it is necessary to examine the origins and purposes of the MCCA as well as the structure and language of all of its provisions.

The Medicaid program, established in 1965 as Title XIX of the Social Security Act, is a joint federal-state program. One purpose is to enable the states to provide medical assistance to the aged "whose income and resources are insufficient to meet the costs of necessary medical services," including nursing home care. 42 U.S.C. § 1396, et seq. The states have considerable freedom to adopt standards for determining the extent of medical assistance, as long as such standards are reasonable and consistent with the objectives of the Act. Obviously no state can adopt programs which violate a mandate of the Act. Monmouth Medical Center v. State of New Jersey, 158 N.J. Super. 241, 249, 385 A.2d 1244 (App.Div. 1978), aff'd., 80 N.J. 299, 403 A.2d 487 (N.J.), cert. denied, 444 U.S. 942, 62 L. Ed. 2d 308, 100 S. Ct. 297 (1979). Thus it is not necessarily impermissible for some states to adopt an income first rule when adjusting resource allocation and for other states to adopt a resource first method.

The New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1, et seq., authorized New Jersey's participation in the Medicaid program.

The Secretary of the U.S. Department of Health and Human Services ("HHS"), through the Health Care Financing Administration ("HCFA"), administers the program at the federal level. At the state level, the administering agency is the Division of Medical Assistance and Health Services ("DMAHS") within the New Jersey Department of Human Services ("DHS"). N.J.S.A. 30:40D-4. The county welfare agencies assist DMAHS in processing applications for Medicaid and determining whether applicants have met the income and resource eligibility standards. N.J.S.A. 30:4D-7a; N.J.A.C. 10:71-3.15.

In order to be eligible for Medicaid, a person must not have available income or assets in excess of prescribed limits. Applicants with income or assets in excess of those limits must "spend-down" before becoming eligible. 42 U.S.C. § 1396(a)(10), (17).

Prior to 1988 the eligibility rules governing spouses forced a couple to liquidate virtually all of their joint resources in order to qualify one of them for Medicaid. Frequently the community spouse was left with nothing on which to live. Further, after the institutionalized spouse became eligible for Medicaid, most of the couple's income had to be used to offset the cost of the institutionalized spouse's nursing home care.

In 1988 Congress addressed the problem of the impoverishment of individuals whose spouses resided in a nursing home and who received Medicaid benefits. This was the origin of the MCCA. Its primary purpose was "to end the pauperization [of the community spouse] by assuring that [she] has a sufficient - but not excessive - amount of income and resources available" when the other spouse is

institutionalized in a nursing home. H.R. Rep. No. 105 (II), supra, 1988 U.S.C.G.A.N. at 888.

At the same time, however, Medicaid remained a program to provide care for the indigent and it was still necessary to protect the public from diversion of public funds from this overriding purpose. Under prior eligibility programs, based on the legal title principle, a couple whose financial position would normally not qualify them for federal assistance could shelter a majority of the resources in the wife's name, while the husband received medical care paid for by public funds. The 1988 amendments closed this loophole by attributing a certain amount of a couple's combined resources to the institutionalized spouse for eligibility purposes, regardless of the legal title. A balance was sought designed to prevent the non-institutionalized spouse from becoming impoverished and at the same time ensuring that no one escape contributing a fair share to the costs of nursing home care.

Different methods have been adopted by the states when implementing the spousal impoverishment provisions in the situation where the institutionalized spouse has both income and assets; i) an income first method, ii) a resource first method, and iii) a hybrid method.

New Jersey has adopted the income first methodology whereby adjustments to the standard allocation of resources ($ 76,740 in the present case) in order to assure sufficient income for the community spouse can only be made after taking into account income transferred from the institutionalized spouse.

New Jersey regulatory provision governing "post-eligibility treatment of income" provides:

> If either (spouse) can establish at the fair hearing that the community spouse's share of the couple's resources is inadequate to raise the community spouse's income (together with the community spouse maintenance deduction) to the maximum authorized level, additional resources . . . may be set aside for the community spouse. The amount of resources to be set aside shall be that amount that is determined sufficient to generate sufficient income to raise the community spouse's gross income to the maximum authorized level. (emphasis added)

N.J.A.C. 10:71-5.7(d).

Other states have adopted a resource first methodology, a methodology which plaintiffs contend is mandated by the MCCA. Under that procedure adjustments to the standard allocation of resources are made whenever the standard allocation generates insufficient income for the community spouse without regard to any permissible income transfer from the institutionalized spouse.

A hybrid approach used in some states leaves to the hearing officer's discretion whether to consider permissible income transfers before increasing the standard resource allocation.

Federal officials administering the Medicaid program have not adopted formal regulations interpreting the spousal impoverishment provisions, leaving to the states the decision whether to consider the institutionalized spouse's income, or solely his resources, in considering adjustments to the standard resource allowance. HCFA and the Secretary of

HHS have stated in policy memoranda and in letters that subsection (e)(2)(C) permits consideration of potential income transfers in determining whether the monthly needs amount will be met. These letters also note that a resource first approach is permissible but not mandatory under the statute. This is consistent with the nature of Medicaid as a cooperative federal-state venture in which states operate programs of their own design subject to federal standards and regulations.

Plaintiffs rely on the plain language of subsection (e)(2)(C). The subsection states that if the resource allowance "is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance" additional resources shall be allocated to the community spouse. Plaintiffs argue that a transfer of a portion of the institutionalized spouse's income cannot be considered the "community spouses's income."

Subsection (e)(2)(C) can be understood only in the context of all of the provisions of MCCA. The first step, therefore, is to examine the statute as a whole and to ascertain how its various parts fit together.

Subsection (a), entitled "Special treatment for institutionalized spouses", emphasizes in various ways the limited nature of MCCA and its application only to the eligibility for medical assistance of institutionalized spouses. It states that its provisions supersede any other provisions of the subchapter concerning grants to states for medical assistance programs. MCCA deals separately with the spouses' income and with the spouses' assets ("resources"). Care must be taken not to apply definitions and provisions

dealing with income to definitions and provisions dealing with resources, and visa versa.

First, as to income: Subsection (b) concerns the treatment of income of each spouse. It governs the determination of "the income of an institutionalized or community spouse for the purposes of the post-eligibility income determinations described in subsection (d)" (emphasis added). In short-hand terminology it incorporates a "name on the check" rule. With respect to non-trust property this is accomplished by a provision reading:

> (i) if payment of income is made solely in the name of the institutionalized spouse or in the community spouse, the income shall be considered available only to that respective spouse;
> (ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them;

42 U.S.C. § 1396r-5(b)(2)(A). Thus for post-eligibility purposes each spouse is entitled to his or her own income.

Subsection (d), to which subsection (b)(2) refers, is entitled "Protecting income for community spouse." Subsection (d)(3) provides for the computation of the community spouse's monthly maintenance needs allowance ("monthly need"). This is an amount designed to ensure that the community spouse has an income significantly above the official poverty line.

Subsection (d)(2) defines the community spouse's monthly income allowance ("monthly allowance"). It is an amount by which:

> (A) except as provided in [the notice and fair hearing subsection] the [monthly need] exceeds
> (B) the amount of monthly income otherwise available to the community spouse . . .

Subsection (d)(1) provides that after an institutionalized spouse has been determined to be eligible for medical assistance, in determining the amount of his income that is to be applied monthly to payment for the costs of his institutionalized care there shall be deducted the community spouse's monthly allowance to the extent it is made available to the community spouse. Thus to the extent that the community spouse's own income (determined as provided in Subsection (b)(2)) is insufficient to meet her monthly need, income of the institutionalized spouse (if he has any) is available to make up the difference.

The foregoing provisions of Subsection (b) and (d) relate to the allocation and use of the income of each spouse. Subsection (c), on the other hand, contains rules for the treatment of the resources of each spouse.

Total joint resources of the two spouses are computed as of the beginning of the first continuous period of institutionalization of the institutionalized spouse. 42 U.S.C. § 1396r-5(c)(1)(A). Under Subsection (c)(1)(B) upon the request of either spouse the state is required to assess and document the total value of the joint resources at the start of the first period of institutionalization. When providing a copy

of the assessment the state is required to include a notice that the requesting spouse has a right to a fair hearing under subsection (e)(2).

Subsection (f)(2)(A) defines community spouse resource allowance (the "resource allowance"). The resource allowance is the greatest of (i) $ 12,000 (adjusted annually), ii) the lesser of one-half total joint resources or $ 60,000 (adjusted annually), iii) an amount established pursuant to a fair hearing, or iv) an amount transferred under court order.

In the present case defendants contend that the community spouse resource allowance should be $ 76,740 computed pursuant to subsection (f)(2)(A)(ii). Plaintiffs contend that the resource allowance should be approximately $ 243,780, computed pursuant to a Subsection (e)(2) fair hearing under subsection (f)(2)(A)(iii).

The computations called for in subsection (f)(2)(A) control how much of the couple's total assets the community spouse is entitled to retain. Subsection (c)(2) of the rules for the treatment of resources provides that in determining the resources of the institutionalized spouse at the time of application for Medicaid benefit, all resources of both spouses shall be considered available to the institutionalized spouse to the extent that they exceed the community spouse resource allowance computed under subsection (f)(2)(A) as of the time of application for benefits.

Subsection (e)(2), to which reference is made in subsection (f)(2)(A)(iii), provides in subsection (e)(2)(C) that:

> If either such spouse establishes that the community spouse resource allowance (in

> relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

The question which divides the parties is whether "the community spouse's income" is limited to her separate income as established in the rules for treatment of income contained in subsection (b)(2) or whether it includes her monthly allowance under subsection (d)(1)(B) (the amount by which the spouses's monthly maintenance needs allowance exceeds the amount of monthly income available to the community spouse).

The attribution of income provisions upon which plaintiffs rely (subsection (b)(2)) do not by their terms apply to allocation of resources which is the subject of subsection (e)(2)(C). They apply "in determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d)." Subsection (d) relates only to the protection of the community spouse's income. Included in that income, of course, will be any income produced by the community spouse's resource allowance.

Thus the attribution of income provisions of subsection (b)(2), limited as they are to the income protection provisions of subsection (d), do not point to plaintiffs' interpretation of "income" as used in subdivision (e)(2)(C). That provision

deals with resource, not income, allocation. In light of the detailed provisions of subsection (d) designed to make available to the community spouse as much, but only as much, of the institutionalized spouse's income as necessary to ensure her monthly need, it would be anomalous to construe subsection (e)(2)(C) in such a manner as to exclude the institutionalized spouse's income from the calculation and substitute for it resources which would provide the needed income to ensure that the community spouse received her monthly needs allowance.

Based simply on the language and structure of the MCCA I conclude that the "community spouse's income" as used in subsection (e)(2)(C) includes any community spouse monthly income allowance available to her pursuant to the provisions of subsection (d). This furthers MCCA"s purpose of ensuring that the community spouse receives a minimum amount of income well above the poverty level. To accomplish this it is not necessary to create an endowment which not only provides the needed income but also creates a fund which can be passed on to the community spouse's heirs. This would subvert the other purpose of MCCA which is to require couples to bear a reasonable amount of the costs of institutionalized care and thus preserve Medicaid resources.

A pre-eligibility hearing is designed to ensure that the community spouse's monthly need will be met at the time of eligibility even after the resources have been spent down to the eligibility level. It is necessary to make a subsection (e)(2)(C) showing in advance of the eligibility date to ensure that sufficient resources are reserved to protect the community spouse's monthly need. However, to interpret the provision of subsection (e)(2)(C) to require exclusion of the community spouse's subsection (d) monthly income transfers

from the institutionalized spouse would frustrate the design of the statute to provide for a transfer of assets only in an amount sufficient to ensure the community spouse's post-eligibility monthly income need and could, as in the present case, result in an unintended windfall to the community spouse and her heirs.[2]

I appreciate that other courts have reached a different conclusion. State of Ohio ex rel. Robert Chambers v. Ohio Department of Human Services, Civ. Action 2-94c-1094 (So. D. Ohio 1995)(appeal pending); Comis v. Bullen, Civ. No. 94-4513 (Sup. Ct. Mass. 1995). A difficult question is presented which ultimately will have to be decided at the appellate level.

Each party in the present case relies on the legislative history to support its position. Citing the very same House and Senate bills and referring to the same conference committee proceedings they arrive at opposite conclusions. The legislative history of the particular subsection of MCCA at issue is not conclusive, but it tends to support defendants' position.

The spousal impoverishment provisions were originally set forth in H.R. 2470, the House bill that became the MCCA. The house bill did not contain any option to increase the standard resource allowance to meet the monthly need amount. The sources available under H.R. 2470 to meet the monthly need were i) the community spouse's own income, ii) any income generated by the standard resource allowance, and iii) transfers of income from the institutionalized spouse (the "community spouse monthly income allowance").

The Senate bill, S.1127, was modeled after the House version but added a provision that would have reduced the resources available to the institutionalized spouse by an amount necessary to generate the monthly need of the community spouse (after counting her own income), without regard to any income of the institutionalized spouse that might be transferred to the community spouse in order to provide her monthly need. Plaintiffs contend that Senate bill S.1127 reflects the meaning of MCCA as finally enacted. The Senate bill also contained a provision granting a hearing to consider increasing either the monthly need allowance of the community spouse or the community spouse resource allowance if they were otherwise inadequate to support the community spouse without financial duress.

The Conference Committee adopted neither the House nor the Senate version. It moved beyond the House bill to provide for an adjustment of the resource allowance, if necessary, to increase the wife's income to the monthly need level. But the Conference Committee, unlike the Senate's bill, did not accomplish this result by "excluding from countable resources those assets necessary to produce income available to the community spouse "H.R.Conf.Rep. No.661, 100th Cong.2d Sess. 265(1988). The Committee's version authorized the fair hearing that is embodied in subsection (e)(2)(C).

Plaintiffs contend that inclusion of the fair hearing provision carried with it the Senate bill's requirement that there be excluded from countable resources those assets necessary to produce income available to the community spouse. This is a questionable leap of logic. More likely, if the conferees had intended to preserve the Senate bill's explicit direction it would have done so expressly. The conferees explained that

in the hearing embodied in subsection (e)(2)(C) the state must allow the community spouse to retain an "adequate" amount of resources to provide the monthly need "taking into account any other income attributable to the community spouse." H.R.Conf.Rep. No. 661, supra (emphasis added). For the purposes of resource allocation (as distinguished from income calculations under subsection (b)), the community spouse monthly income allowance provided for in subsection (d)(1)(B) is certainly "income attributable to the community spouse."

Thus the legislative history points not to the construction of subsection (e)(2)(C) which plaintiffs urge. Rather it tends to support either defendants' position that the income first rule is required by the statute or perhaps the position of the responsible administrative agencies that the states have discretion to apply either the income first or resource first rule.

The position of the agencies charged with the administration of this important, complicated health care program is significant. The federal officials administering the Medicaid program have concluded that Congress has given the States authority to decide whether to consider the institutionalized spouse's income or solely his resources in considering adjustments to the standard resource allowance. This view has not been formalized in regulation, but has been stated in policy memoranda and in letters.

Were I to consider the question without the benefit of the views of these agencies, I might well interpret subsection (e)(2)(C) to require an income first approach.

However, under established principles, "inherent in the powers of an administrative agency is the authority to formulate policies and to promulgate rules to fill any gaps left, either implicitly or explicitly, by Congress." Tate & Lyle, 87 F.3d at 104. Thus, a federal court should defer to the reasonable interpretation of a federal agency responsible for administration of the relevant program, whether or not the agency's interpretation is the only reasonable one. Chevron U.S.A., Inc. V. National Resources Defense Council, Inc., 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984); West v. Sullivan, 973 F.2d 179, 185 (3d Cir. 1992) cert. denied, 508 U.S. 962, 124 L. Ed. 2d 684, 113 S. Ct. 2934 (1993). Applying these principles requires a conclusion that New Jersey's income first method is at least a permissible application of the statute.

For the foregoing reasons I conclude that plaintiffs' have not established a likelihood of success on the merits of the claims asserted in their second count, and the motion for an order preliminarily enjoining defendants from implementing its income first policies will be denied.

Plaintiffs also seek an order enjoining defendants from continuing practices which violate the notice provisions of MCCA. The state has a statutory obligation to enforce requirements imposed upon nursing homes to inform institutionalized persons and their spouses. The state also has a statutory obligation to prepare a notice of the rights of Medicaid patients. Plaintiffs allege, and defendants concede, that the state has not fully performed either obligation.

In response to the order to show cause the state has undertaken to review its process of surveying nursing homes and to ascertain whether the surveyors are enforcing nursing

home notice requirements. The state is also reviewing the documents which it is responsible for preparing and will make such modifications as are necessary. It has undertaken to complete both phases of its corrective action within 30 days of the hearing on the preliminary injunction application.

In these circumstances an injunction is unnecessary. The application for injunctive relief with respect to notice requirements will be denied, but the denial will be without prejudice in the event that the state does not complete the corrective action described at the hearing.

Because plaintiffs are unlikely to prevail on the merits it is unnecessary to consider the other requirements for preliminary injunctive relief. Were these requirements to be addressed it would be necessary to evaluate the impact such an injunction would have upon nursing homes generally and upon the state's short term ability to provide institutionalized care for its elderly citizens. It would also be necessary to determine if in lieu of the immediate injunctive relief the plaintiffs seek on behalf of themselves and all others similarly situated, equitable considerations would require some form of phased transition from an income first to a resource first rule.

I shall file an order implementing this opinion.

DATED: February 25, 1997

DICKINSON R. DEBEVOISE

U.S.S.D.J.

----------Footnotes----------

[1] This figure probably over estimates the impact, because during the spend down process it is unlikely that the institutionalized spouse would spend all of his assets on nursing home care. However, as in the case of the Clearys, people in that position would most likely pay a very substantial part of their assets to the nursing home.

[2] Plaintiff's note that in some circumstances a community spouse's income may drop when the institutionalized spouse dies. For example aggregate Social Security payments may be less, as in the present case. This is a circumstance which could be considered at a subsection (e)(2)(C) hearing and adequate resources allocated to provide for that eventuality.

CIVIL ACTION NO. 96-4774 (DRD)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THOMAS J. CLEARY by his next friend, Carolyne Cleary, and CAROLYNE CLEARY individually, on their own behalf and on behalf of all other persons similarly situated,
Plaintiffs,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES, LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES, VELVET G. MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, and MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES,
Defendants.

ORDER

Date: 2/25/97

Plaintiffs having moved for an order preliminary enjoining defendants i) from continuing practices which violate notice provisions of the Social Security Act, 42 U.S.C. Sec. 1396, et seq. and ii) from continuing to

implement New Jersey's "income first rule" when determining when an institutionalized spouse becomes Medicaid eligible; and the New Jersey Association of Health Care Facilities and the New Jersey Association of Non-Profit Homes for the Aging (collectively referred to as the "Intervenors") having moved to intervene in this case; and the court having held a hearing on these motions and set forth its findings of fact and conclusions of law in an opinion of even date,

IT IS THIS 25th day of February 1997 ORDERED as follows:

1. The Intervenors' motions to intervene in this case are granted.

2. Plaintiffs' motion for an order preliminary enjoining defendants from continuing practices which violate notice provisions of the Social Security Act, U.S.C. Sec. 1396, et seq., is denied, except that i) on or before March 21, 1997 the defendants shall file with the court and serve upon counsel for plaintiffs and for the Intervenors a certification describing all action taken by them to cure all deficiencies in their notices and in their notice monitoring procedures, and ii) the denial of the motion with respect to notices and notice monitoring proceudres is without prejudice to its renewal in the event the defendants fail to act promptly to cure these deficiencies.

3. Plaintiffs' motion for an order preliminarily enjoining defendants from continuing to implement New Jersey's income first rule" when determining when an institutionalized spouse become Medicaid eligible is denied.

s/DICKINSON R. DEBEVOISE
U.S.S.D.J.

No. 97-5145

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,
Appellants,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES; VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES; NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,
Intervenors-Defendants in District Court

JUDGMENT

Dated: 2/8/99

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 27, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 28, 1997, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/CLERK

No. 97-5145

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,
Appellants,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES; VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES; NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,
Intervenors-Defendants in District Court

ORDER

Dated: 3/30/99

The petition for rehearing in banc filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having been asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

s/_____
Circuit Judge

42 U.S.C. 1396r-5(e)(2)(C).

REVISION OF COMMUNITY SPOUSE RESOURCE ALLOWANCE.--If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

N.J.A.C. 10:71-5.7.

Post-eligibility treatment of income: institutionalized individuals

(d) When the institutionalized individual's income is insufficient to provide the maximum authorized deduction for the community spouse, either the institutionalized spouse or the community spouse can request a fair hearing in accordance with N.J.A.C. 10:71-8.4. If either member can establish at the fair hearing that the income generated by the community spouse's share of the couple's resources is inadequate to raise the community spouse's income (together with the community spouse maintenance deduction) to the maximum authorized level, additional resources (beyond the community spouse's share as established at N.J.A.C. 10:71-48) may be set aside for the community spouse. The amount of resources to be set aside shall be that amount that is determined sufficient to generate sufficient income to raise the community spouse's gross income to the maximum authorized level.

US Code as of: 01/26/98

Sec. 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions
In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections (a)(17) and 1396a(f) of this title) which is inconsistent with them.

(2) No comparable treatment required
Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section (a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations
Except as this section specifically provides, this section does not apply to -

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects
In the case of any State which is providing medical assistance to its residents under a waiver granted under section of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement
if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories This section shall only apply to a State that is one of the
50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs
This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section -4(a)(7) of this title) or
under a PACE program under section -4 or 1395eee of this title.

(b) Rules for treatment of income

(1) Separate treatment of income
During any month in which an institutionalized spouse is in the
institution, except as provided in paragraph (2), no income of the community spouse shall

be deemed available to the institutionalized spouse.

(2) Attribution of income In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property
Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides -

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property
In the case of a trust -

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections (a)(17) and 1396p(d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust -

(I) if payment of income is made solely to the institutionalized spouse or the

community spouse, the
income shall be considered available
only to that respective spouse;

(II) if payment of income is made to
both the institutionalized spouse and
the community spouse, one-half
of the income shall be considered
available to each of them; and

(III) if payment of income is made to
the institutionalized spouse or the community spouse, or both, and to another
person or persons, the income shall be
considered available to each spouse in
proportion to the spouse's interest (or,
if payment is made with respect to
both spouses and no such interest is
specified, one-half of
the joint interest shall be considered
available to each spouse).

(C) Property with no instrument
In the case of income not from a trust
in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall
be considered to be available to the institutionalized spouse and one-half to
the community
spouse.

(D) Rebutting ownership
The rules of subparagraphs (A) and (C)
are superseded to the extent that an

institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provide l under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources
There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse) -

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment
At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of

resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property -

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community

spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights
The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where -

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined
In this section, the term "resources" does not include -

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse
After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1396a(q)(1) of this

title), in an amount not less than the amount specified in section (q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section (r) of this title).
In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which -

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general
Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds -

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section (2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph

(4)).
A revision of the official poverty line referred to in clause

(i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent
For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of -

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance
The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined
In paragraph (3)(A)(ii), the term "excess

shelter allowance" means, for a community spouse, the amount by which the sum of -

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section (e) of title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses, exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support
If a court has entered an order against an institutionalized spouse for monthly income for the support of the community
spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing

(1) Notice
Upon -

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse, each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general
If either the institutionalized spouse or the community spouse is dissatisfied with a determination of -

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section); such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been

made
on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance
If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimummonthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance
If either such spouse establishes that the community spouse
resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be

substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general
An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which -

(A) the greatest of -

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount

specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3);
exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders
If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

(g) Indexing dollar amounts
For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) of this section shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions
In this section:

(1) The term "institutionalized spouse" means an individual who -

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

RESOURCE-FIRST STATES

California: *In re Hearing of Claimant Jane,* Administrative Hearing No. 91035034 CC, California Depart. Of Human Services

Florida: FLA. ADMIN. CODE ANN. r. 65A-1.701 (1998); *McGraw v. Agency for Health Care Admin.,* Appeal No. 98F-3528, Office of Appeal Hearings for the State of Florida, Department of Children and Families (February 1, 1999)

Illinois: ILL. ADMIN. CODE tit. 89, § 120.379 (1997)

Iowa: 441 IOWA ADMIN. CODE r. 75.5(3)(f) (1998)

Massachusetts: MASS. GEN. L. ch. 118E, § 21A (1999)

Minnesota: MINN. STAT. ANN. § 256B.059.4 (West 1998)

Nevada: NEV. REV. STAT. ANN. § 123.259(5) (Michie 1996)

Ohio: OHIO ADMIN. CODE §5101:6-7-02 (1998)

Pennsylvania: *Hurly v. Houston,* No. 93-3666 (E.D. Pa. July 1, 1996)

Virginia: VA. CODE ANN. § 20-88.02:1 (Michie 1995)

INCOME-FIRST STATES

Colorado: 10 COLO. CODE REGS. §2505-10, Rule 8.112.13(E) (1998)

Maryland: MD. REGS. CODE tit. 10, § 10.09.24.10-1(F)(4) (1998)

New Hampshire: N.H. CODE ADMIN. R. He-W 656.01 (proposed April 14, 1999)

North Dakota: N. D. ADMIN. CODE §75-02-02.1-24(7)(e) (1997)

Texas: TEX. ADMIN. CODE tit. 40 §15:503(j) (1998)

Wisconsin: WIS. STAT. ANN. §49.455(8)(d) (West 1997)

DEPARTMENT OF HEALTH AND HUMAN SERVICES

FROM: Director
Medicaid Bureau

SUBJECT: Spousal Impoverishment and Hearing Officer's Authority to Protect Additional Resources

TO: All Regional Administrators
Attn: Associate Regional Administrator,
Division of Medicaid

A State has raised some concerns to us about a November 18, 1993 memorandum which we sent tot he Dallas Regional office. This memorandum health with the subject of allowing individuals who are covered under the spousal impoverishment provisions to have a hearing to raise the amount of resources protected for the Community spouse. We sent copies of this memorandum to all regional administrators. The November 18th memorandum to all hearing officers must follow the guidelines that were attached to the memorandum. Also, the memorandum suggested that a couple's right to a hearing to raise the protected resource amount (PRA) was available only as part of the post eligibility process.

The spousal impoverishment provisions in Sec. 1924 of the Social Security Act are extremely complicated. They are in places ambiguous and incomplete. We believe that this is particularly the case in regard to the provisions which allows a couple to have a hearing to raise the PRA. because this issue is complex, it may have resulted in our failing to clearly

explain our position on the subject in some of our policy issuances. We would like at this time to clarify our current policy.

Although our memorandum suggested that the hearing to raise the PRA is available only as part of the post-eligibility process, we meant, that the hearing is available as part of the institutionalized spouse's initial eligibility determination, when the spouses' resources are pooled and a specific amount is protected for the community spouse. We must "after eligibility" only in the sense that an institutionalized spouse who is found ineligible can resort to a hearing to try to raise the PRA before reapplying.

The memorandum also appears to require that States follow the guidelines that were attached to the memorandum. Among these guidelines was the requirement that the institutionalized spouse first make available to the community spouse the largest possible income allowance (as determined by the State) under the post-eligibility calculation before he or she can raise the PRA. We did not intend to mandate the policies in the guidelines; they are instead "guidance" which we believe is a reasonable interpretation of the spousal impoverishment provisions. That is, States are not required to follow these "guidelines," but may follow other reasonable interpretations of the law.

The State Medicaid Manual (SMM) provision which covers this issue is located in Sec. 3262.3. It says that there can be no substitutions [for the PRA] when institutionalized spouses do not make available monthly income allowances to community spouses (the "income first" rule). We have never intended to mandate this policy. The transmittal page that was

issued with the manual provision contained the following note:

> Although this manual is interpretative, it contains certain requirements which are specified by statute and are binding, as well as "derived" policies which build upon the statutory requirements. These derived policies are identified as such and are in no way binding. You are free to adopt reasonable alternative interpretations with respect to them until we adopt final regulations addressing these policies.

The "income first" rule is not specified by the statute and as such is a "derived" policy. As a result, the policy should not be considered as binding. However, because we tried to issue the SMM sections covering spousal impoverishment as quickly as possible, we inadvertently failed to identify this policy as a "derived policy within the text of the EMM. As a result, we believe that States may have been somewhat confused about our position on the "income first" issue. We would now like to clarify that States have the option to use the "income first" rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

Sally Richardson

Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

No. 99-49

IN THE

Supreme Court of the United States

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other Persons similarly situated,

Petitioners,

v.

WILLIAM WALDMAN, in his official capacity as Commissioner of New Jersey Department of Human Services; LEONARD FISHMAN, in his official capacity as Commissioner of New Jersey Department of Health and Senior Services; VELVET MILLER, in her official capacity as Director of Division of Medical Assistance and Health Services; MARK SCHIFFER, in his official capacity as Director of Passaic County Board of Social Services;
NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE RESPONDENTS IN OPPOSITION TO PETITION

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August 1999

Counsel for State Respondents

QUESTION PRESENTED

Whether New Jersey's use of an "income-first" methodology in determining whether a community spouse is entitled to set aside a larger share of resources than the standard maximum resource allowance set by statute is a permissible interpretation of 42 U.S.C. § 1396r-5(e)(2)(C).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

REASONS FOR DENYING THE WRIT 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

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IN THE

Supreme Court of the United States

No. 99-49

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other Persons similarly situated,

Petitioners,

v.

WILLIAM WALDMAN, in his official capacity as Commissioner of New Jersey Department of Human Services; LEONARD FISHMAN, in his official capacity as Commissioner of New Jersey Department of Health and Senior Services; VELVET MILLER, in her official capacity as Director of Division of Medical Assistance and Health Services; MARK SCHIFFER, in his official capacity as Director of Passaic County Board of Social Services;
NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE RESPONDENTS IN OPPOSITION TO PETITION

Respondents, various New Jersey state officials sued in their official capacities (collectively referred to herein as

"the State Respondents"), hereby submit this brief in opposition to the petition for certiorari filed by Thomas J. and Carolyne Cleary ("Petitioners").[1]

STATEMENT OF THE CASE

The question presented involves the reasonableness of the State's interpretation of subsection (e)(2)(C) of the spousal impoverishment provisions of the Medicaid program, section 1924 of the Social Security Act, enacted in Section 303 of the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), Pub. L. No. 100-360, 102 Stat. 683. The spousal impoverishment provisions are codified at 42 U.S.C. § 1396r-5 ("the statute").

In enacting the spousal impoverishment provisions, Congress sought to address two perceived flaws in the then-existing Medicaid eligibility rules as they applied to elderly married couples. The first and most significant problem was that the prior eligibility rules required a married couple to deplete, or "spend-down," nearly all of their joint resources before a spouse requiring institutional care (the "institutionalized spouse") could qualify for Medicaid. This was compounded by the further requirement that the institutionalized spouse, once eligible for Medicaid, apply

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[1] The suit was originally brought against William Waldman, in his official capacity as Commissioner of New Jersey Department of Human Services; Leonard Fishman, in his official capacity as Commissioner of New Jersey Department of Health and Senior Services; Velvet Miller, in her official capacity as Director of Division of Medical Assistance and Health Services; and Mark Schiffer, in his official capacity as Director of Passaic County Board of Social Services. Since then, Mr. Waldman, Mr. Fishman, and Ms. Miller have been succeeded in office by Michelle K. Guhl, Christine Grant, and Margaret A. Murray, respectively. Counsel for Respondents has notified the Clerk of this change pursuant to Rule 35 of the Rules of the Court.

most of the couple's monthly income to offset the cost of his care. Accordingly, the spouse remaining in the community (the "community spouse") was left with little or no income or resources on which to live once the institutionalized spouse qualified for Medicaid.

At the same time, however, the prior law left open a number of loopholes whereby a couple could shelter a great deal of resources in trusts or in the community spouse's name such that the institutionalized spouse could qualify for Medicaid at a higher wealth level than that contemplated by the Medicaid program, which was designed to provide assistance to the aged "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396 *et seq.* The spousal impoverishment provisions were thus designed "'to end th[e] pauperization [of the community spouse] by assuring that [she] has a sufficient—*but not excessive*—amount of income and resources available" on which to live once the institutionalized spouse becomes eligible for Medicaid. H.R. Rep. No. 100-105(II), 100th Cong., 2nd Sess. 65, *reprinted in* 1988 U.S.C.C.A.N. 857, 888 (emphasis added).

As enacted, the statute addresses these joint concerns by specifying certain minimum and maximum income and resource "allowances" that should be protected for the maintenance of the community spouse once the institutionalized spouse qualifies for Medicaid. As for resources, the statute provides for a "resource allowance" for the community spouse which cannot be included among those resources that need to be spent-down before the institutionalized spouse may qualify for Medicaid. The standard resource allowance is determined by each state, but can be no less than the statutory minimum — $12,000 (adjusted annually) or a greater amount set by the state — and no greater than the statutory maximum — the lesser of one-half of a couple's total joint countable resources or

$60,000 (adjusted annually) — unless a higher allowance is substituted by hearing or court order. 42 U.S.C. § 1396r-5(f)(2)(A).[2] To prevent the sheltering of additional resources, the statute provides that all of a couple's remaining countable resources in excess of this resource allowance be counted in determining the institutionalized spouse's eligibility for Medicaid. *See id.* § 1396r-5(c)(2).

As for income, the statute initially provides that income paid solely in the community spouse's name cannot be considered "available" to the institutionalized spouse to apply towards the cost of his care once he becomes eligible for Medicaid. *Id.* § 1396r-5(b). The statute also provides that a community spouse is entitled to a minimum monthly maintenance needs allowance ("minimum monthly need") once the institutionalized spouse becomes eligible for Medicaid. *Id.* § 1396r-5(d)(3). The minimum monthly need is an amount considerably above the poverty level, established by each state within certain maximum and minimum levels. *Id.* If the amount of monthly income available to the community spouse falls short of this minimum monthly need, the statute further provides that the institutionalized spouse can transfer his available monthly income to the community spouse in an amount necessary to make up that shortfall before applying any income towards the cost of his care. *Id.* § 1396r-5(d)(1)(B). The amount so

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[2] In 1996, for instance, the standard maximum resource allowance was $76,740. Thus, if a couple had $200,000 in countable joint resources at the time the spouse entered an institution, the community spouse would be entitled to a resource allowance of $76,740, unless a larger resource allowance were set by hearing or court order. If a couple had $100,000 in countable joint resources, the community spouse would be entitled to a resource allowance of $50,000 (one-half of the joint resources), unless a larger allowance were set by hearing or court order.

transferred is called the "community spouse monthly income allowance," and is defined as the amount by which the minimum monthly need exceeds "the amount of income otherwise available to the community spouse." *Id.* § 1396r-5(d)(2).

Subsection (e) of the statute, the subsection at issue here, provides for a fair hearing mechanism in which couples may seek adjustments to the standard allowances provided for in the statute, including, among others, the standard resource allowance, minimum monthly need allowance, and community spouse monthly income allowance described above. *Id.* § 1396r-5(e)(2). In particular, subsection (e)(2)(C) provides:

> If either spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly needs allowance.

Id. § 1396r-5(e)(2)(C).

The states have interpreted this subsection in various ways. Some states apply a "resource-first" approach. In "resource-first" states, if the community spouse demonstrates that monthly income in her own name, including monthly earnings from the standard resource allowance, will not be enough to meet the minimum monthly needs amount once the institutionalized spouse becomes eligible for Medicaid, the hearing officer will substitute for the standard maximum resource allowance that amount of resources needed to generate the shortfall, without regard to any income that the institutionalized spouse may transfer to the community

spouse under the statute. For community spouses who do not receive much income in their own names, this can mean that literally hundreds of thousands of dollars of a couple's resources are protected from being spent-down in the process of rendering the institutionalized spouse eligible for Medicaid.[3]

Other states, like New Jersey, follow an "income-first" approach in determining whether to substitute a resource allowance that is greater than the standard maximum amount provided for in the statute. In "income-first" states, the hearing officer first looks to see whether monthly income that the statute expressly permits the institutionalized spouse to transfer to the community spouse to meet her minimum monthly need will be sufficient to make up any shortfall between the community spouse's own monthly income and the minimum monthly need amount. Only if the income transferable from the institutionalized spouse will not be sufficient to make up the shortfall do these states permit the substitution of a higher resource allowance.

It is the permissibility of the income-first approach that is the sole issue on which Petitioners seek review. In a well-reasoned opinion, the district court below rejected Petitioners' contention that the plain meaning of the statute

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[3] For example, in the case of the Clearys, Mrs. Cleary receives a social security check in her own name in the amount of $516.50 per month. The standard maximum resource allowance applicable in her case is $76,740, which earns approximately $311.74 in monthly interest at a 5% rate of return. Her minimum monthly need allowance, as calculated under the State rules, is $1,524.40. Under the resource-first approach, she would be able to make up the $696.28 monthly shortfall by increasing her resource allowance by an additional $167,040, producing a total resource allowance of $243,780, over three times the maximum standard amount. *See Cleary v. Waldman*, 959 F. Supp. 222, 227 (D.N.J. 1998), *aff'd*, 167 F.3d 801 (3rd Cir. 1999); Petition at 38a.

mandates a resource-first approach, and concluded that the statute was, at best for Petitioners, ambiguous on this question. The Third Circuit affirmed.

SUMMARY OF ARGUMENT

This Court declined to review this precise question only nine months ago, when the Sixth Circuit Court of Appeals reached the same result as the courts below, and there is no reason for further review now. Petitioners' arguments have been presented to and rejected by two federal Courts of Appeal and the highest courts of the states of New York and Massachusetts. All of these courts agree that subsection (e)(2)(C) is ambiguous and permits states to adopt either a resource-first or an income-first approach. This view is consistent with informal policy statements and memoranda issued by the U.S. Department of Health & Human Services ("HHS") and the Health Care Financing Administration ("HCFA"), the federal agencies assigned responsibility for administering the Medicaid statute.

Petitioners nevertheless contend that this Court should grant the writ because the divergent approaches taken by the states undermine Congress's goal of a "uniform spousal impoverishment" program across the states. There is no such goal in the Medicaid program generally, nor in the spousal impoverishment provisions in particular. Variety in state programs is inherent to the Medicaid program. Although the federal statutes impose certain mandatory guidelines, participating states are generally afforded broad discretion in implementing their programs consistent with those guidelines. Specifically, the spousal impoverishment provisions on their face allow for differences in the various allowances among the states. Moreover, the statute provides that adjustments to the maximum standard resource allowance can only be granted through a fair hearing process, an inherently discretionary mechanism. The fact that Congress structured the statute so as to define a standard

maximum resource allowance and provide for adjustments to that standard level only through a fair hearing process readily demonstrates that Congress contemplated that the States might implement such adjustments in different manners.

As the Third Circuit correctly concluded, had Congress desired the uniform result urged by Petitioners – that community spouses in all instances be entitled to a resource allowance in an amount sufficient to generate any shortfall between the community spouse's own income and the minimum monthly need allowance – it could simply have defined the standard resource allowance accordingly. The fact that it did not – and in fact ultimately rejected a version of the bill that did just that – demonstrates the lack of merit in Petitioners' argument that the plain meaning of the statute mandates a resource-first approach.

REASONS FOR DENYING THE WRIT

The question presented does not satisfy this Court's traditional criteria for certiorari. This Court denied certiorari to review this precise question presented in a case out of the Sixth Circuit only nine months ago in *Chambers v. Ohio Department of Human Services*, 119 S. Ct. 408, 142 L. Ed. 2d 331 (Nov. 2, 1998). Nothing has occurred since that time that argues in favor of granting the writ now. The only case to address the question since is the Third Circuit decision at issue, in which the court, consistent with the Sixth Circuit in *Chambers*, held that the income-first approach used by New Jersey is a permissible interpretation of the statute.

Every United States Court of Appeal and every state court of last resort to rule on the issue has reached this same result. *See Cleary v. Waldman*, 167 F.3d 801 (3rd Cir. 1999); *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408, 142 L. Ed. 2d 331 (1998); *Thomas v. Commissioner of the Division of Medical Assistance*, 682 N.E.2d 874 (Mass. 1997); *Golf v. New York*

Dept. of Social Servs., 91 N.Y.2d 656 (1998). Moreover, the result reached by these courts is consistent with the interpretation of subsection (e)(2)(C) espoused by HHS and HCFA, the federal agencies charged with administering the Medicaid program at the federal level. These agencies have stated in informal policy statements and letters that participating states have the option of using either the income-first or resource-first approach. *See* HCFA Memorandum from Medicaid Bureau Director Sally Richardson (March 1994) (stating that states may elect either approach); HCFA Letter to Pennsylvania Department of Public Welfare (April 1994) (same); Chicago Regional State Letter 22-94 (July 1994) (same); Letter from Donna E. Shalala to George V. Voinovich (March 1996) (same).[4]

The only judicial decisions not reversed on appeal that hold that subsection (e)(2)(C) mandates a resource-first methodology are from two Ohio intermediate appellate courts, both decided prior to the Sixth Circuit's decision in *Chambers*. *See Kimnach v. Ohio Dep't of Human Servs.*, 645 N.E.2d 825 (Ohio App. 10th Dist. 1994), *appeal denied*, 644 N.E.2d 409 (Ohio 1995); *Gruber v. Ohio Dep't of Human Servs.*, 647 N.E.2d 861 (Ohio App. 5th Dist.), *appeal denied*, 644 N.E.2d 409 (Ohio 1995). The only other purportedly "inconsistent" decisions cited by Petitioners are a federal district court approval of a settlement in which Pennsylvania agreed to employ the resource-first method, *see Hurly v. Houston*, No. 93-3666 (E.D. Pa. July 1, 1996), a decision by the Office of Appeal for Florida's Department of Children

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[4] HCFA had taken the position in an earlier policy statement that states should adopt the income-first approach, *see* Chicago Regional State Letter, HCFA State Medicaid Manual, HCFA-Pub. 45, § 3262.3 (Dec. 1993), but later clarified that the prior policy was not binding and that the states could choose between either approach.

and Families that it could not consider the issue because prior Office of Appeal precedent established use of the resource-first method in Florida, *see McGraw v. Agency for Health Care Administration*, Appeal No. 98F-3528, and several state and federal court decisions that have subsequently been reversed on appeal.[5] These decisions do not raise a conflict of such significance as to merit review by this Court.

Notwithstanding the decisive weight of judicial and federal administrative authority against their position, Petitioners contend that this Court should grant the writ because of the importance of the question presented to the administration of the statute. The divergent application of subsection (e)(2)(C) among the states, Petitioners argue, undermines Congress's purported goal of establishing a "uniform spousal protection program."

As this Court's past experience with the Medicaid Act can surely attest, *see*, *e.g.*, *Atkins v. Rivera*, 477 U.S. 154, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986); *Schweiker v. Hogan*, 457 U.S. 569, 102 S. Ct. 2597, 73 L. Ed. 2d 227 (1982), variance among individual state Medicaid programs is inherent to the Medicaid system. No two state Medicaid programs are alike. While the Act imposes certain mandatory minimum and maximum benefits, the vast

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[5] *See State of Ohio ex. rel. Robert Chambers et al. v. Ohio Dep't of Human Servs.*, No. C-2-94-1094 (S.D. Ohio Feb. 16, 1996) (granting partial summary judgment for plaintiffs), *rev'd*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408, 142 L. Ed. 2d 331 (1998); *Comis v. Bullen*, No. 94-4513 (Mass. Sup. Ct. Jan. 31, 1996) (granting partial summary judgment for plaintiffs), *rev'd, sub. nom. Thomas v. Commissioner of the Division of Medical Assistance*, 682 N.E.2d 874 (Mass. 1997); *Golf v. New York Dept. of Social Servs.*, 634 N.Y.S. 2d 581 (A.D. 4th Dept. 1995) (reversing lower court ruling that income-first methodology was not permissible), *rev'd*, 91 N.Y.2d 656 (1998).

majority of benefits provided under the Act are optional, and the States are afforded a great deal of discretion in the manner in which their individual programs are implemented.

The spousal impoverishment provisions are no exception. Even on the face of the statute, there is no absolute parity of treatment of community spouses among the participating states. For instance, although the statute mandates certain minimum and maximum amounts for the minimum monthly needs allowance, the states may choose any amount in between. *See* 42 U.S.C. § 1396r-5(d)(3). Thus, a community spouse in one state may be entitled to a minimum monthly need allowance that is significantly less than the amount a community spouse is entitled to in another state.[6] Likewise, each state has the option of choosing a minimum resource allowance that is greater than the standard minimum set forth in the statute. *See id.* § 1396r-5(f)(2)(A)(i).

While Congress may have intended that community spouses in every state have a specified amount of monthly income available to them, as established by each state within the maximum and minimum range, once the institutionalized spouse becomes eligible for Medicaid, both the "resource-first" and the "income-first" approaches attain this goal. The only difference between the approaches is whether the hearing officer may first consider income transferable from the institutionalized spouse in determining whether the community spouse's minimum monthly needs allowance will be met. Either approach makes monthly income available to the community spouse to meet her minimum monthly need

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[6] States also have some discretion under the statute in determining whether the community spouse is entitled to certain "excess shelter" costs in addition to the maximum minimum monthly need allowance. *See* 42 U.S.C. § 1396r-5(d)(4).

once the institutionalized spouse becomes eligible for Medicaid. The statute does not envision any greater uniformity in attaining this end.

Petitioners suggest that where Congress intended the States to exercise discretion it did so explicitly. Even accepting this premise solely for purpose of argument, what better way to indicate discretion than to provide for a fair hearing mechanism? The fact that Congress structured the statute so as to define a standard maximum resource allowance and to provide for adjustments to that standard level only through a fair hearing process, an inherently discretionary mechanism, undermines Petitioners' suggestion that Congress intended the States to implement the adjustments provided for in subsection (e)(2)(C) in a uniform manner across the states.

The "uniform" rule urged by Petitioners would, in fact, render subsection (e)(2)(C) superfluous. Had Congress intended the "plain meaning" urged by Petitioners, it could have defined the standard resource allowance as that amount needed to bring the community spouse's own monthly income up to the minimum monthly need amount. As discussed in the Third Circuit Court's opinion below, that is precisely what the Senate version of the bill proposed. That version was ultimately rejected, however, in favor of the law ultimately adopted. *See Cleary*, 167 F.3d at 811; Petition at 22a.

Petitioners spend a great deal of their brief discussing the financial plight of community spouses in "income-first" states, who must live on the standard maximum resource allowance provided for in the statute and a monthly income allowance consisting in part of income transferred from the institutionalized spouse. But the standard maximum resource allowance, together with the minimum monthly need allowance, was determined by Congress to be sufficient to protect the community spouse from impoverishment. To the

extent that Petitioners' real concern is that the standard allowances provided for in the statute are too low to protect community spouses from impoverishment, the appropriate place to seek relief is Congress, not this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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THOMAS J. CLEARY, by his next friend, Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official

(*Caption continued*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES

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capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES; VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES,

NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Denying the Writ	2
I. This Court Has Already Fully Considered, And Declined To Review, The Question Presented In The Petition.	2
II. The Right Of The States To Choose Between The Income First Rule And The Resource First Rule Does Not Interfere With The Uniform Protection Sought By The Spousal Impoverishment Provisions Of The Medicaid Catastrophic Coverage Act Of 1988.	4
III. The Third Circuit Court Has Correctly Interpreted The Federal Law At Issue.	7
Conclusion	12

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Page

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Skidmore v. Swift & Co., 323 U.S. 134 (1944) 9

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42 U.S.C. § 1396r-5d 8

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42 U.S.C. § 1396r-5(d)(1)(B) 7

42 U.S.C. § 1396r-5(d)(1)(C) 6

42 U.S.C. § 1396r-5(d)(3)(A) 6

42 U.S.C. § 1396r-5(e)(2)(C) 7, 8

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Page

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Letter from Donna E. Shalala, HHS, to George V. Voinovich (March 1996) 5

Letter from HCFA to Pennsylvania Department of Public Welfare (April 1994) 5

STATEMENT OF THE CASE

Petitioners here challenge the decision of the United States Court of Appeals for the Third Circuit in *Cleary ex rel. v. Waldman*, 167 F.3d 801 (3d Cir. 1999). The Third Circuit held in *Cleary* that New Jersey may apply the "income first" rule, rather than the "resource first" rule, in determining the amount of resources that a community spouse must "spend down" before his or her institutionalized spouse becomes eligible to have the cost of his or her nursing home care paid for by the New Jersey Medicaid program.

The right of a state to choose to employ *either* the income first rule or the resource first rule has been endorsed by both of the federal agencies charged with administering the federal government's participation in each state's Medicaid program. Those endorsements have been subsequently upheld in well-reasoned decisions by the Courts of Appeal in both the Third Circuit and the Sixth Circuit, the only two federal intermediate appellate courts that have to date considered and ruled on this issue. More importantly, this Court recently reviewed — and denied — the Petition for a Writ of *Certiorari* filed in the Sixth Circuit case.

Despite all this, Petitioners now ask this Court to grant the Petition, reverse the Third Circuit's decision in *Cleary* and require New Jersey to apply solely the resource first rule. For the reasons set forth below, Respondent, New Jersey Association of Health-Care Facilities ("Respondent"), submits that the *Cleary* decision does not warrant review, much less reversal, by this Court and respectfully asks this Court to summarily deny the Petition.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY FULLY CONSIDERED, AND DECLINED TO REVIEW, THE QUESTION PRESENTED IN THE PETITION.

The exact legal question posed in the Petition was previously submitted to this Court on August 25, 1998 in the Petition for a Writ of *Certiorari* filed in *Chambers v. Ohio Dep't of Human Serv.*, 145 F.3d 793 (6th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 408 (1998). In *Chambers*, a class action suit challenging the application by the Ohio Department of Human Services of the income first rule, the Sixth Circuit reversed the federal district court's holding that the Medicare Catastrophic Coverage Act (the "MCCA") mandates the use of the resource first rule. *Chambers*, 145 F.3d at 804. On November 2, 1998, this Court denied the *Chambers* Petition, a fact conspicuously absent from the *Cleary* Petition.

The reasoning of the Sixth Circuit in *Chambers* not only presaged the reasoning of the Third Circuit in *Cleary*, but the Sixth Circuit also cited extensively, with favor, to the district court's opinion in *Cleary* which was subsequently reviewed and affirmed by the Third Circuit. Therefore, there is no legal question raised here that could in any way alter this Court's prior determination in *Chambers* that the grant of *certiorari* is not warranted to review the current state of law which upholds a state's right to choose between the income first and the resource first approaches.

In addition, there has been no applicable intervening amendment to the MCCA or to its federal or New Jersey implementing regulations that might cause this Court to question its decision in November 1998 to decline to review this issue. Nor has there been a change in the stated policy positions of both the Health Care Financing Administration ("HCFA") and the United States Department of Health and Human Services ("HHS"), the agencies charged with administering the federal government's participation in each state's Medicaid program, specifically endorsing the right of a state to choose to apply either the income first rule or the resource first rule.

Finally, the factual circumstances in *Cleary* are, if anything, less compelling than those in *Chambers*. In the latter case, the application of the resource first rule would have permitted one of the named claimants to have sheltered $97,000 in resources from the Medicaid "spend down" rules, compared with $72,660 under the income first rule. *Chambers*, 145 F.3d at 800 n.12. In *Cleary*, as noted by the federal district court, the application of the resource first rule would enable the plaintiffs to shelter assets in excess of $243,000, compared with $76,740 under the income first rule. *Cleary ex rel. v. Waldman*, 959 F. Supp. 222, 227-28 (D.N.J. 1997), *aff'd*, 167 F.3d 801 (3d Cir. 1999).

In short, it is clear that this Court has already determined that the single legal question raised in the Petition does not warrant further review. Because nothing has occurred in the brief intervening period that could have affected this Court's reasoning in *Chambers*, the fact of this Court's prior decision on the *Chambers* Petition is, in and of itself, sufficient to justify the denial of the *Cleary* Petition.

II.

THE RIGHT OF THE STATES TO CHOOSE BETWEEN THE INCOME FIRST RULE AND THE RESOURCE FIRST RULE DOES NOT INTERFERE WITH THE UNIFORM PROTECTION SOUGHT BY THE SPOUSAL IMPOVERISHMENT PROVISIONS OF THE MEDICAID CATASTROPHIC COVERAGE ACT OF 1988.

Petitioners argue that the current state of the law that permits states to select either the income first rule or the resource first rule interferes with the goal of the MCCA to establish a "uniform national spousal protection policy that applies in all States" which participate in the Medicaid program. H.R. Rep. No. 105(II), 100th Cong., 2d Sess. 4 (1987), *reprinted in* 1988 U.S.C.C.A.N. 857, 892 (the "House Report"). This assertion is unfounded.

The Medicaid program is "a cooperative federal-state venture in which states operate programs of their *own design*", subject to federal standards and regulations. *Cleary*, 167 F.3d at 805 (emphasis added). Consistent with this principle and in order to promote the integrity of the Medicaid program, the federal government affords the states maximum flexibility in meeting the equally important, yet competing, goals of the MCCA: to prevent the pauperization of the community spouse during the period his or her spouse is institutionalized, while at the same time ensuring that couples use a fair share of their own resources to pay for the institutionalized spouse's nursing home care. House Report, at 65; *see also Cleary*, 959 F. Supp. at 229 ("The states have considerable freedom to adopt standards for determining the extent of medical assistance, as long as such standards are reasonable and consistent with the objectives of the [Medicaid] Act.").

The MCCA was carefully drafted in recognition of the compelling public interest that requires states to "preclude couples who possess[ ] substantial resources from qualifying for Medicaid" in order to properly apportion their limited resources and meet their obligations to the medically indigent, as well as the elderly. *Cleary*, 167 F.3d at 805. Moreover, because it is an entitlement program, the Medicaid program is charged with taking all necessary measures to ensure that the implementation of the MCCA does not "facilitate the transfer of accumulated wealth from nursing home patients to their non-dependent children." House Report, at 73. The use of the income first rule is an option available to the states to assist them in achieving the delicate balance of preventing the impoverishment of those who currently have resources without depriving the indigent of their right to medical care.

HCFA and HHS also recognize the need to provide states with substantial latitude in order to enable them to meet the goals of the MCCA. These agencies have repeatedly stated their position that, unless and until federal regulations are formally adopted to mandate a single approach, states are free to elect to apply either the income first rule or the resource first rule. *See Cleary*, 167 F.3d at 806-07 and n.3 (citing HCFA State Medicaid Manual, HCFA-Pub. 45, § 3262.3; HCFA Memorandum from Medicaid Bureau Director Sally Richardson (March 1994); Letter from HCFA to Pennsylvania Department of Public Welfare (April 1994); and Letter from Donna E. Shalala, HHS, to George V. Voinovich (March 1996)).

Far from creating a "patchwork of radically different applications of the law" as Petitioners contend, permitting states to choose either rule is also consistent with the

flexibility intentionally built into the other provisions of the MCCA, including the right of each state to establish, within statutorily defined upper and lower limits: (i) the amount of the minimum monthly needs allowance for the community spouse, 42 U.S.C. § 1396r-5(d)(3)(A); (ii) a personal needs allowance for the institutionalized spouse, 42 U.S.C. § 1396r-5(d)(1)(A); (iii) a family allowance for each family member of the institutionalized spouse, 42 U.S.C. § 1396r-5(d)(1)(C); and (iv) the community spouse resource allowance, 42 U.S.C. § 1396r-5(f)(2). The availability of the income first rule, along with the discretion to establish the allowances described above, maximizes the ability of each state to fashion and implement, again within circumscribed limits, Medicaid rules and regulations in order to protect community spouses while preventing couples from manipulating the Medicaid program in order to preserve hundreds of thousands of dollars in assets for the benefit of their heirs, but at the expense of the taxpayers.

For these reasons, it is clear that allowing states the option of whether to implement the income first rule or the resource first rule both advances the intent of the MCCA and fits neatly within the statutory scheme. By providing states with the discretion to adopt either approach, Congress has given states the necessary flexibility to meet all of their obligations under the entire Medicaid program in general and the MCCA in particular.

III.

THE THIRD CIRCUIT COURT HAS CORRECTLY INTERPRETED THE FEDERAL LAW AT ISSUE.

The Third Circuit (and the district court below) correctly analyzed the facts and the law in *Cleary* and rendered a soundly reasoned and clearly articulated decision upholding New Jersey's use of the income first rule. All of the parties to this matter agree that the single critical issue is whether the term "community spouse's income" as used in the section of the MCCA governing revisions to the community spouse resource allowance (the "CSRA Provisions"), 42 U.S.C. § 1396r-5(e)(2)(C), means only the community spouse's personal income under the "name on the check rule" or whether it means all of the income available to the community spouse, including that portion of the institutionalized spouse's income attributed to the community spouse under 42 U.S.C. § 1396r-5(d)(1)(B). *See Cleary*, 167 F.3d at 806.

The Third Circuit adopted the district court's conclusion that, due to the complexity of the MCCA and its interlocking provisions, the definition of "community spouse's income" in the CSRA Provisions is ambiguous and requires an examination of legislative intent, as well as an analysis of the deference to be afforded the interpretation offered by HHS and HCFA. *Id.* at 807. The Third Circuit found that the availability of the income first rule not only "conforms to the language of the statute, to its legislative history and the purpose for which it was enacted", but is also a reasonable interpretation by HCFA and HHS of the intricate MCCA scheme and thus entitled to deference. *Id.* at 811-12. Based on this analysis, the Third Circuit affirmed the district court's decision that New Jersey is entitled to employ the income first rule. *Id.* at 812.

Petitioners have not raised even a single credible argument that would support a further review by this Court of the *Cleary* decision, let alone its reversal. First, Petitioners argue that the meaning of the term "community spouse's income" as used in the CSRA Provisions is *not* ambiguous. This is despite the fact that, as Petitioners admit, the very question of what that term actually means has spawned numerous lawsuits including the instant matter. It is obvious that, as used in the MCCA, the term "community spouse's income" has different meanings and includes various components of "income" depending on its context. *Id.* at 807.

The CSRA Provisions provide for an increase in the CSRA if it is established that the CSRA "is inadequate to *raise the community spouse's income* to the [MMMNA]." 42 U.S.C. § 1396r-5(e)(2)(C) (emphasis added). Petitioners urge that "community spouse's income" should be read here to include only that income attributed to the community spouse under the "attribution of income rules", 42 U.S.C. § 1396r-5(b)(2). However, as both decisions below in *Cleary* point out, the attribution of income rules apply expressly by their terms to the rules governing the protection of income for the community spouse, 42 U.S.C. § 1396r-5d, but do not expressly apply to the CSRA Provisions. As a result, Petitioners' argument to the contrary is unpersuasive.

Petitioners also attack the deference properly accorded by the Third Circuit to the interpretations, albeit informal, adopted by HCFA and HHS with regard to the availability of both the income first rule and the resource first rule. Although HCFA corrected a directive in a regional letter that indicated the income first rule is *required* by the MCCA, neither HCFA nor HHS has ever taken a position other than that the use of the income first rule is, at the very least, permissible under the MCCA.

Federal courts are required to defer to a federal agency's reasonable interpretation of a statute over which it has administrative and rule-making authority. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Even informal agency interpretations are entitled to deference where, as here, they "are made 'in pursuance of official duty, based upon more specialized experience and broader investigation and information than is likely to come to a judge.' " *Cleary*, 167 F.3d at 807-08 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Thus, the deference owed — and given — here by the Third Circuit to the informal pronouncements of HCFA and HHS provides further support for the ruling permitting New Jersey to apply the income first rule in implementing the MCCA.

Finally, Petitioners' citation to a statement by Senator Mitchell as support for the proposition that Congress intended to mandate the use of the resource first rule cannot go unchallenged. Senator Mitchell's remarks accompanied his introduction of S. 1127 (the "Senate Bill"), the proposed Senate version of the MCCA. 133 Cong. Rec. 29,356 (1987). The Senate Bill was modeled after H.R. 2470 (the "House Bill"), the first bill introduced into Congress that embodied the spousal impoverishment provisions which, as modified, would become the MCCA.

The House Bill did not provide for an upward adjustment of the CSRA as the result of a fair hearing. Instead, it made only the following sources available to the community spouse in meeting the MMMNA: (i) the community spouse's own income; (ii) any income generated by the CSRA; and (iii) transfers of income from the institutionalized spouse. H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 923, 1039 (the "House

Conference Report"); *see Cleary*, 959 F. Supp. at 233. The Senate Bill, on the other hand, included a provision that increased the CSRA in the event that the community spouse's own income was insufficient to meet the MMMNA, regardless of any income of the institutionalized spouse that might be available for transfer to the community spouse. House Conference Report at 263-64; *see Cleary*, 959 F. Supp. at 233.

The compromise version of the MCCA ultimately enacted by Congress rejects that portion of the Senate Bill which "excludes from countable resources those assets necessary to produce income available to the community spouse." House Conference Report at 265. Instead, it permits either spouse to request a fair hearing on whether the CSRA is adequate to generate sufficient income to raise the community spouse's income to the MMMNA.

> If the State, after such a hearing, determines that the [CSRA] is inadequate the State must allow the community spouse to retain an adequate amount of resources to provide the [MMMNA] (*taking into account any other income attributable to the community spouse*), notwithstanding the amount of the State established resource allowance. [*Id.* (emphasis added).]

The requirement that the state take into account "any other income attributable to the community spouse", particularly when read in the context of the revisions to the original bill, can most logically and fairly be interpreted to include any of the institutionalized spouse's income that has been attributed to the community spouse under the MCCA.

This offers strong evidence for the proposition that Congress intended, at the very least, that states be permitted to employ the income first rule. Senator Mitchell's remarks, which could be construed to require the application of the resource first rule, made as they were in connection with provisions of the bill that were rejected in the final version of the MCCA, undermine, rather than support, Petitioners' position.

In summary, the Third Circuit's decision in *Cleary* is firmly grounded in both the language and the legislative history of the MCCA. The *Cleary* decision is also in harmony with the interpretation of the MCCA that has been endorsed by both HCFA and HHS. In light of these facts, it is abundantly clear that the issue set forth in the Petition does not warrant this Court's review.

CONCLUSION

This Court has already determined in *Chambers*, a case virtually identical to *Cleary*, that the issue raised in the Petition does not merit the grant of *certiorari*. Nothing has occurred in the interim that would tend in any way to alter this Court's prior determination. For that reason alone, Respondent respectfully submits that the Petition be denied.

Moreover, even in the absence of this Court's prior decision to deny the *Chambers* Petition, there is no doubt that the reasoning of the Third Circuit in *Cleary* is consistent with the language, legislative intent and spirit of the MCCA. In addition, the stated policies of each of the federal agencies having jurisdiction over the administration of the Medicaid program are in complete accord with the *Cleary* decision. For these reasons, Respondent respectfully submits that this Court should deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THOMAS J. CLEARY, by his next friend, Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES;

(*Caption continued*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING

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NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

QUESTION PRESENTED FOR REVIEW

Whether the District Court and the Court of Appeals correctly held that New Jersey's adoption of the "income first" method for determining medicaid eligibility, as expressly authorized by the United States Department of Health and Human Services, is permissible under 42 U.S.C. § 1396.

STATEMENT PURSUANT TO RULE 29.6

Respondent, New Jersey Association of Non-Profit Homes for the Aging ("NJANPHA"), is a not-for-profit corporation organized under the laws of the State of New Jersey. NJANPHA's members include approximately 130 non-profit and governmental long-term care and assisted living facilities which provide housing, health care and related services to elderly residents throughout New Jersey.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Summary of Argument	1
Reasons for Denying the Writ	3
I. This Court Recently Denied Certiorari On The Question Presented.	3
II. The Decision Below Does Not Conflict With Any Standing Federal Or State Court Decision.	4
III. The Third Circuit Correctly Interpreted The Medicaid Laws.	7
A. The Petitioner's "Uniformity" Argument Is Not Properly Before This Court Because It Was Not Raised in or Considered by the Court of Appeals	7
B. Congress Did Not Intend to Preclude the States from Adopting the Income-First Method	8
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Auer v. Robbins, 519 U.S. 452 (1997) 7

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 7

Chambers v. Ohio Dep't of Human Services, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408 (1998) 1, 3, 4, 9

Cherry by Cherry v. Sullivan, 30 F.3d 73 (7th Cir. 1994) 9

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13

Comis v. Bullen, No 94-4513 (Mass Sup. Ct. Jan. 31, 1996) 5

Duignan v. United States, 274 U.S. 195 (1927) ... 8

Ford v. Iowa Dep't of Human Services, 500 N.W.2d 26 (Iowa 1993). 8

Golf v. New York Dep't of Social Services, 88 N.Y.2d 960, 634 N.Y.S.2d 581 (A.D. 4th Dept. 1995), *rev'd*, 91 N.Y.2d 656 (1998) 5

Harris v McRae, 448 U.S. 297 (1980) 8

Cited Authorities

	Page
Herweg v. Ray, 455 U.S. 265 (1982)	11
Holly Farms Corp. v. N.L.R.B., 517 U.S. 392 (1996)	7
Hurly v. Houston, No. 93-3666 (E.D. Pa. July 1, 1996)	4
Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977)	8
Rust v. Sullivan, 500 U.S. 173 (1991)	13
Thomas v. Comm'r of the Div. of Medical Assistance, 425 Mass. 738, 682 N.E.2d 874 (1997)	5
Youakim v. Miller, 425 U.S. 231 (1976)	8

Statutes:

42 U.S.C. § 1396, *et seq.*	i, 2, 8
42 U.S.C. § 1396(d)(2)	10
42 U.S.C. § 1396(f)(2)	10
42 U.S.C. § 1396r-5	2, 8, 12
42 U.S.C. § 1396r-5(e)(2)	14
42 U.S.C. § 1396r-5(e)(2)(A)	14
42 U.S.C. § 1396r-5(e)(2)(C)	10, 12, 14

Page

Other Authorities:

HCFA Chicago Regional State Letter No. 22-94 (Jul. 1994) 12

HCFA Chicago Regional State Letter No. 51-93 (Dec. 1993) 12

H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. at 265 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1035-47 13

H.R. Rep. No. 105(II), 100th Cong., 2d Sess. 65-68 (1988), *reprinted in* 1988 U.S.C.C.A.N. 803 ... 8, 9

State Medicaid Manual, HCFA Pub. 45-3, § 3703.4, Transmittal No. 32 (Feb. 1988) 12

State Medicaid Manual, HCFA-Pub. 45-3, § 3260, Transmittal No. 39 (Oct. 1989) 11

SUMMARY OF ARGUMENT

The Petitioners fail to disclose the key fact that, in November 1998, this Court considered — and denied — a petition for a writ of certiorari to the Sixth Circuit on the precise legal issue raised here. While the Petitioners cite *Chambers v. Ohio Dep't of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408 (1998), their citations carefully omit any reference to the case history in this Court. The Petitioners compound these misleading citations when, in their narrative discussion of *Chambers*, they again never mention this Court's denial of certiorari in that case. Unless we are to assume that these repeated failures are mere oversight, the only explanation is that the Petitioners are intentionally trying to hide the fact that this Court already passed on the question the Petitioners present for review.

The Petitioners have not shown any compelling reason why this Court should reverse course and grant certiorari now for a Third Circuit decision that is in complete agreement with the Sixth Circuit decision for which certiorari was denied just a few months ago.

There is no conflict among the United States Courts of Appeal. The Sixth Circuit and the Third Circuit are the only United States Courts of Appeal to address this issue. Both courts reached the very same conclusion. That conclusion is not in conflict with any decisions of this Court. Even more broadly, every standing federal or state court decision on this legal question uniformly agrees with the Third Circuit. There is absolutely no split of authority for this Court to resolve.

Equally important, the Third Circuit's unanimous decision is correct. The Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396, *et seq.*, addresses the proper method for dividing a married couple's income and resources to determine Medicaid eligibility when only one spouse is in a health care facility. To provide limited financial protection to the community spouse, Congress authorized the allotment of income and resources between the spouses and the transfer of a portion of the institutionalized spouse's share, but only to the extent needed to maintain a minimum monthly income for the community spouse. This minimum income is a modest amount set by statute to enable the community spouse to live with dignity, but not in affluence.

Congress' concern in permitting any transfer of assets from the institutionalized spouse is to preserve the community spouse's minimum monthly income. The Petitioners nevertheless contend that 42 U.S.C. § 1396r-5 prohibits states from transferring the institutionalized spouse's income first and instead requires the transfer of resources. The transferred resources would then generate income that would raise the community spouse's total income to the minimum level. Under the Petitioners' incongruous view, the community spouse would thereby receive not only the minimum income intended by Congress, but also the windfall of substantial assets. Not surprisingly, Congress did not intend the MCCA as a tool to divert resources from the institutionalized spouse and accelerate his or her Medicaid eligibility.

As with the overall Medicaid Program, Congress intended the MCCA to set minimum conditions and benefits and allow each State the discretion to augment these benefits to the extent they chose. Congress did not limit States to

either an "income first" or a "resource first" method. States have the discretion to adopt either method. This discretion has been squarely confirmed by the interpretations and guidelines issued by the United States Department of Health and Human Services, the federal agency charged with administering the Medicaid Program. The Petitioners' principal argument — that Congress intended to impose a uniform, nationwide allocation method — is not properly before this Court because it was not raised or considered below. Even more, that new-found argument is wrong. New Jersey's adoption of the "income first" method is consistent with federal law.

REASONS FOR DENYING THE WRIT

I.

THIS COURT RECENTLY DENIED CERTIORARI ON THE QUESTION PRESENTED.

Just a few months ago, in November 1998, this Court denied a petition for a writ of certiorari to the Sixth Circuit on the precise legal issue raised here. In *Chambers v. Ohio Dep't of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408 (1998), the Court of Appeals held that Ohio's decision to apply the income-first approach was reasonable and permissible under the MCCA. *Chambers*, 145 F.3d at 804. *Chambers* is critical to the Petitioners' application because it is the only United States Court of Appeals decision, other than the Third Circuit decision at issue here, ever to address the question presented for review.

Despite this significance, in their citations to *Chambers*, the Petitioners carefully omit any reference to the case history

in this Court. This lack of candor is repeated when, in the Petitioners' substantive discussion of *Chambers*, they again fail to mention that certiorari was sought and denied in that case. By hiding this Court's disposition of *Chambers*, the Petitioners presumably hope to avoid having to explain why the Court should reverse course and now grant certiorari on the very same issue decided the very same way. Not surprisingly, the Petitioners offer no reason whatsoever for this Court to change its mind. There is no reason. The petition for a writ of certiorari should be denied.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY STANDING FEDERAL OR STATE COURT DECISION.

There is no conflict among the United States Courts of Appeal for this Court to resolve. Both the Sixth Circuit and the Third Circuit — the only United States Courts of Appeal to have addressed this issue — concluded that the States have the discretion under the MCCA to adopt the income-first method for allocating assets to the community spouse. Not surprisingly, the Petitioners do not even pretend that there is any such split of authority among the Courts of Appeals warranting review by this Court.

The Petitioners instead try to contrive a conflict in the lower courts by citing federal and state court cases that were later reversed or overruled. The Petitioners cite the District of Ohio decision in *Chambers* that was reversed by the Sixth Circuit and has no precedential effect. (Pet. 8). The Petitioners likewise cite *Hurly v. Houston*, No. 93-3666 (E.D. Pa. July 1, 1996), a District Court decision that never

ruled directly or in dicta on the legal question at issue. The Petitions cite *Golf v. New York Dep't of Social Services*, 88 N.Y.2d 960, 634 N.Y.S.2d 581 (A.D. 4th Dept. 1995), *rev'd*, 91 N.Y.2d 656 (1998), a New York intermediate court decision that was reversed by its highest court. Finally, the Petitioners cite *Comis v. Bullen*, No 94-4513 (Mass Sup. Ct. Jan. 31, 1996), a Massachusetts trial court decision that was overruled by its highest court in *Thomas v. Comm'r of the Div. of Medical Assistance*, 425 Mass. 738, 682 N.E.2d 874 (1997). While the Petitioners understandably prefer to blur the focus of their petition by referencing obsolete case law, the fact remains that there is not a single standing federal or state court decision in conflict with the Third Circuit decision at issue.

The Petitioners similarly try to create the false impression that there is nationwide confusion about the propriety of the income-first method. For this misplaced purpose, the Petitioners cite policy statements of the Health Care Finance Administration ("HCFA"), the part of the United States Department of Human Services charged with the administration of the Medicaid Program. However, HCFA has never once suggested that States could not adopt the income-first method. To the contrary, HCFA has consistently stated that the income-first method is a permissible, if not the preferable, application of the MCCA. HCFA's directive on the topic is unambiguous:

> States have the option to use the income first rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

(Memorandum from Medicaid Bureau Director Sally Richardson (March 4, 1994)). The Petitioners cannot seriously suggest that this clear and long-standing statement evidences any confusion as to propriety of the income-first method.

Nor do the Petitioners show any confusion by referencing the approaches of various State legislatures. That some States have adopted the resource-first method, or are considering doing so, while others have adopted the income-first method, merely shows that the States are freely exercising the discretion Congress intended and HCFA confirmed. It does not mean that States are confused as to how to implement the MCCA.

There is no reason to consider the merits of this issue now. There is no evidence of any disagreement among the courts, HCFA, or the States as to the discretion given each State to adopt the income-first approach. Further percolation in the lower courts either will confirm the current consensus that "income first" is a permissible method for allocating assets or will create the kind of substantive and reasoned split of authority that warrants this Court's review.

III.

THE THIRD CIRCUIT CORRECTLY INTERPRETED THE MEDICAID LAWS.

A. The Petitioner's "Uniformity" Argument Is Not Properly Before This Court Because It Was Not Raised in or Considered by the Court of Appeals

The Petitioners filed lengthy briefs in the Third Circuit in which they raised and argued many issues. Yet they never argued on appeal that Congress intended to impose on the States a single uniform method for allocating additional assets to the community spouse. This is nonetheless the Petitioners' principal argument in this Court. (Pet. 7). Indeed, the Petitioners devote a full third of their brief to showing that some States have approved a resource-first method while others have approved an income-first method. The Petitioners cannot raise this argument for the first time now.

This Court repeatedly has made clear that it will not consider on a writ of certiorari an argument not raised below. *See, e.g., Auer v. Robbins*, 519 U.S. 452 (1997); *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392 (1996). The Court looks for a fully developed record, including the guidance of the Court of Appeals, on all issues that it addresses. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 n.23 (1989). By failing to raise this specific argument on appeal, the Petitioners have deprived this Court of the Third Circuit's analysis and views on that issue.

While this Court has the power to deviate from its general rule, "[i]t is only in exceptional cases coming [to this Court] from the federal courts that questions not pressed or passed

upon below are reviewed." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)). This is surely not such an exceptional case. Indeed, the Petitioners have not even attempted to justify their failure to raise the "uniformity" argument in the Court of Appeals. This previously unasserted argument "is so obviously an afterthought" as not to warrant consideration by this Court. *See Miree v. DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977).

B. Congress Did Not Intend to Preclude the States from Adopting the Income-First Method

There is no mystery as to the purpose of the Medicaid Program, 42 U.S.C. § 1396, *et seq*. Congress enacted Medicaid as a cooperative federal-state effort to "provide federal financial assistance to states that choose to reimburse certain costs of medical treatment *for needy persons*." *Harris v McRae*, 448 U.S. 297, 301 (1980) (emphasis added). Medicaid is a means-tested welfare program. Benefits are available only to persons whose own income and resources are insufficient to meet the cost of necessary medical care. 42 U.S.C. § 1396. In short, Medicaid "requires that an elderly or disabled nursing home resident be poor in order to qualify for coverage." H.R. Rep. No. 105(II), 100th Cong., 2d Sess. 65-68 (1988), *reprinted in* 1988 U.S.C.C.A.N. 803, at 888.

The Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396r-5 ("MCCA"), did not overturn this purpose. Congress enacted the MCCA in 1988 in part to soften the financial impact of the prior law on individuals whose spouses reside in nursing homes or other facilities and receive Medicaid benefits. *Ford v. Iowa Dep't of Human Services*, 500 N.W.2d 26, 27 (Iowa 1993). Under the prior law, nearly

all of a couple's assets had to be depleted before either one could satisfy Medicaid eligibility requirements, impoverishing the spouse who remained in the community. House Rep., at 888-92. The MCCA revised the rules regarding the attribution and transfer of both income and resources between spouses to prevent the total pauperization of the community spouse. *Id.* at 888. Congress' intent was simply to assure that the community spouse have "a sufficient — but not excessive — amount of income and resources available [while the institutionalized spouse] is in a nursing home at Medicaid expense." *Id.* at 888. In essence, the MCCA attempted to strike a careful balance between protecting the community spouse from total impoverishment, and protecting the limited resources of the Medicaid Program needed for our aging population. *Chambers*, 145 F.3d at 797.

The MCCA was not meant as a tool to shelter wealth. Congress was properly concerned that — as part of a welfare program — Medicaid eligibility standards should not "facilitate the transfer of accumulated wealth from nursing home patients to their nondependent children." House Rep., at 896. The Medicaid Program also

> recogniz[es] the marital relationship for what it is, a relationship of interdependence wherein it is neither unfair nor unrealistic to require one spouse to support the other, in particular to help meet the obligation to pay for family medical bills.

Cherry by Cherry v. Sullivan, 30 F.3d 73, 75 (7th Cir. 1994). To prevent the transfer of an excessive amount of income and resources away from the institutionalized spouse, Congress defined a specific "minimum monthly maintenance needs allowance" ("MMMNA") for the community spouse.

This minimum income is set by statute at modest amount to enable the community spouse to live with dignity, but not in affluence.

This is the key language at issue:

> If any such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)(2)(C). The question is whether "the community spouse's income" includes — or does not include — any transfer of income from the institutionalized spouse. The "community spouse's income" can encompass several things. In fact, the statute broadly contemplates the allocation of income to the community spouse from a variety of sources, including: the income paid directly to the community spouse, the income generated by the "community spouse resource allowance" (created by Section (f)(2)), and the "community spouse monthly income allowance" (created by Section (d)(2)). Importantly, Congress defined the amount of the "community spouse monthly income allowance" as that amount of income needed to raise the income otherwise available to the community spouses up to the MMMNA. 42 U.S.C. § 1396(d)(2). All of these sources constitute "the community spouse's income." Given Congress' narrow purpose, the most sensible interpretation of "the community

spouse's income" encompasses all income which the community spouse will receive from all sources while the institutionalized spouse is receiving Medicaid — including the "community spouse monthly income allowance." What the statutory language and scheme demonstrate is that Congress' principal concern was assuring the community spouse's minimum monthly *income,* not encouraging the transfer of the institutionalized spouse's resources and thereby accelerating Medicaid eligibility.

Any ambiguity in the statute has been resolved by HCFA. Congress vested broad discretion with the United States Department of Health and Human Services — the agency charged with implementing the Act — to interpret and "define the eligibility requirement for Medicaid." *Herweg v. Ray*, 455 U.S. 265, 274 (1982). The Department, through HCFA, has repeatedly interpreted the Act as permitting states to use an "income first" method to raise the community spouse's income to the MMMNA.

HCFA's guidelines clearly reflect approval of "income first" as a permissible allocation method under the MCCA. The *State Medicaid Manual*, HCFA-Pub. 45-3, § 3260, Transmittal No. 39 (Oct. 1989), issued by the Health Care Financing Administration shortly after Congress enacted the Medicare Catastrophic Coverage Act, provides guidelines for the states to follow regarding income and resource determinations for institutionalized individuals who have a community spouse. This is what the *State Medicaid Manual* initially directed:

> For an individual with only a spouse at home, *a state must deduct from the individual's total income an amount for the maintenance needs of*

> *the spouse*. The state must base this amount on a reasonable assessment of the needs of the spouse which includes consideration of the spouse's income and resources. The amount deducted for the needs of the spouse must be reduced dollar for dollar for each dollar of the noninstitutionalized spouse's own income.

State Medicaid Manual, HCFA Pub. 45-3, § 3703.4, Transmittal No. 32 (Feb. 1988) (emphasis added). HCFA later provided a more direct interpretation:

> [W]e are requiring that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance under [42 U.S.C. § 1396r-5](d)(1)(B) before being allowed to raise the [CSRA] under section [42 U.S.C. § 1396r-5](e)(2)(C). The state would have the discretion to determine the maximum amount of income that the institutionalized spouse can afford to protect for the community spouse.

HCFA Chicago Regional State Letter No. 51-93 (Dec. 1993). HCFA later further modified its directive to allow the States more flexibility:

> We would now like to clarify that States have the option to use the "income first" rule or apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

HCFA Chicago Regional State Letter No. 22-94 (Jul. 1994). HCFA has never interpreted 42 U.S.C. § 1396r-5(e)(2)(C)

as precluding the income-first method. To the contrary, HCFA has unambiguously interpreted the MCCA as permitting states to adopt the "income first" method followed by New Jersey.

This agency interpretation is entitled to substantial deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). "[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* The agency's construction of an ambiguous statute may not be disturbed if it reflects a reasonable construction of the statute and does not otherwise conflict with Congress' expressed intent. *Rust v. Sullivan*, 500 U.S. 173, 174 (1991).

There is nothing about the language or purpose of the MCCA that suggests that Congress intended to impose a single, nationwide allocation method. The Petitioner rests their argument on the slenderest foundation — a single phrase taken out of context from a House Report on a version of the bill never enacted. The reference in the House bill to establishing "a uniform national spousal protection policy that applies in all States. . . ." (Pet. 7), alludes to the overall policy of protecting the community spouse with a minimum income, not to the precise method for allocating income or resources to achieve this minimum income.

Equally important, the Conference Committee adopted neither the House nor the Senate versions of the bill. *See* H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. at 265 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1035-47. Unlike the House version, the version adopted by the Conference Committee provided for the adjustment to the community spouse resource allowance if necessary to increase the

community spouse's income to meet the minimum monthly needs allowance. But, unlike the Senate version, the Conference version did not achieve the result through the reallocation of resources. The Conference version instead provided for a fair hearing process in subsection (e)(2), which permits reconsideration of any one of five components of the community spouse's income in subsection (e)(2)(A) and allows a revision of the community spouse resource allowance in subsection (e)(2)(C). The Conference Committee specifically chose not to adopt the resource-first approach as proposed by the Senate. There is no basis for the Petitioners' argument that Congress imposed either resource-first or income-first as the sole method for the States to use.

States have the discretion to adopt either method. This discretion in consistent with the language, legislative history, and purpose of the MCCA and the Medicaid Program. It does not undermine any uniformity intended by Congress. Moreover, this discretion has been squarely confirmed by the interpretations and guidelines issued by the United States Department of Health and Human Services, the federal agency charged with administering the Medicaid program.

As the Third Circuit correctly held, New Jersey's decision to transfer "income first" in implementing the MCCA is wholly consistent with federal law.

CONCLUSION

For these reasons, the New Jersey Association of Non-Profit Homes for the Aging requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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(5)

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In the

Supreme Court of the United States

October Term, 1998

THOMAS J. CLEARY, by his next friend Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

v

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES; VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES

NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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1 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THIS COURT'S PRIOR DENIAL OF A PETITION FOR WRIT OF CERTIORARI REFLECTS NO EXPRESSION OR VIEW OF THE MERITS OF THIS CASE. 1

II. PETITIONER'S ARGUMENT REGARDING THE UNIFORMITY OF THE LAW WAS PROPERLY RAISED. 2

III. THE MEDICAID PROGRAM IN GENERAL AND THE SPOUSAL IMPOVERISHMENT PROVISIONS SPECIFICALLY DO NOT ALLOW FOR THE VARIANCE POSTURED BY RESPONDENTS. 3

IV. THE APPLICATION OF A UNIFORM NATIONAL SPOUSAL PROTECTION PLAN THAT APPLIES IN ALL STATES DOES NOT RENDER SECTION (e)(2)(C) SUPERFLUOUS. 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Chambers v. Ohio Department of Human Services, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S.Ct. 408, 142 L.Ed. 2d 331 (1998) 1, 2

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 366 n.1 (1973) 2

Maryland v. Baltimore Show, 338 U.S. 912, 917-918 (1950) 2

Simmons v. Union News Co., 382 U.S. 884, 886 (1965) 7

United States v. Carver, 260 U.S. 482, 490 (1923) 2

Other Authorities

State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 393, 402-03 (1960) 2

Statutes

42 U.S.C. §1396a(a)(10)(A)(I)(III). 3

42 U.S.C. §1396a(a)(1)-(65) 3

42 U.S.C. §1396a(a)(10)(D) 4

42 U.S.C. §1396a(a)(10)(F) 4

42 U.S.C. §1396a(a)(51) 4, 5

42 U.S.C. §1396r-5 *et seq.* 1, 4, 5

42 U.S.C. §1396r-5(c) 6

42 U.S.C. §1396r-5(d)(3) and (4) 4

42 U.S.C. §1396r-5(e)(2)(C) 4, 5

Petitioner Carolyne Cleary submits this brief in reply to the briefs in opposition filed by New Jersey state officials ("State Respondents"), New Jersey Association of Health-Care Facilities ("NJAHCF"), and New Jersey Association of Non-Profit Homes for the Aging ("NJANPHA")(where appropriate, collectively referred to as "Respondents").[1]

I. THIS COURT'S PRIOR DENIAL OF A PETITION FOR WRIT OF CERTIORARI REFLECTS NO EXPRESSION OR VIEW OF THE MERITS OF THIS CASE.

Respondents first argue that the instant writ should be denied since this Court declined to review a case in which the application of subsection (e)(2)(C) of the spousal impoverishment provisions of the Social Security Act, 42 U.S.C. §1396r-5 *et seq.*, was similarly at issue.[2]

This Court's prior denial of a Petition for Writ of Certiorari is irrelevant. The Court has made it uncompromisingly clear that the denial of a writ of certiorari carries no implication or inference concerning its view of the merits of a

[1] Carolyne Cleary's institutionalized spouse, Petitioner Thomas J. Cleary, passed away on May 8, 1999. Consistent with the demographic data for this population presented for this Court's consideration in the instant Petition, Mrs. Cleary outlived her husband. In accordance with New Jersey's income first rule, she spent approximately $168,000 before Mr. Cleary became eligible for medical assistance on August 1, 1997.

[2] *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S.Ct. 408, 142 L.Ed. 2d 331 (1998). NJANPHA accuses Petitioner of "intentionally trying to hide the fact that this Court already passed on the question", (Resp. 1), and, supposedly presuming such a feat to be possible, "hiding this Court's disposition of *Chambers*." Resp.4. Respondent's assumptions are incorrect. The lack of acknowledgment of *Chambers* history in this Court in the citations to that case was an oversight for which the undersigned assumes responsibility.

case. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1 (1973)(referring to Justice Frankfurter's statements regarding the denial of certiorari in *Maryland v. Baltimore Show*, 338 U.S. 912, 917-918 (1950); *United States v. Carver*, 260 U.S. 482, 490 (1923). Among other reasons, a petition may be denied for lack of accuracy, brevity and clarity. S.Ct. R. 14.4. Indeed, the Court "may well take the very next case raising the same question and reach a different result on the merits." Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 402-03 (1960).

The irrelevancy of Respondents' argument notwithstanding, Petitioner points out that Petitioners in *Chambers* presented four questions for review, thereby submitting to this Court a case or controversy quite dissimilar from the instant petition.

State Respondents argue that nothing has occurred since the Court's denial of certiorari in the Sixth Circuit case that would be of significance to the Court in it consideration of the instant request. Petitioners reply that the petition speaks adequately for the importance of the question presented.

II. PETITIONER'S ARGUMENT REGARDING THE UNIFORMITY OF THE LAW WAS PROPERLY RAISED.

NJANPHA states that Petitioner improperly raised the argument that Congress intended to impose a single uniform method for allocating additional assets to the community spouse, since allegedly it was never raised in the Court of Appeals. Respondent is wrong. The undersigned counsel of

record raised this argument before the Court of Appeals at the oral argument on January 27, 1998. In addition, Petitioner's lead argument in her Petition for Rehearing and Rehearing En Banc, timely filed in the Court of Appeals, was that the panel's holding "destroys the uniform national spousal protection policy that Congress intended...." Pet.Reh. 3-4.

III. THE MEDICAID PROGRAM IN GENERAL AND THE SPOUSAL IMPOVERISHMENT PROVISIONS SPECIFICALLY DO NOT ALLOW FOR THE VARIANCE POSTURED BY RESPONDENTS.

Petitioners urge this Court to recognize Respondents' mischaracterizations of the variations allowed individual States in conducting their Medicaid programs. State Respondents, who find the single subsection at issue in this case too "complex" to be accorded plain meaning, now nonchalantly pronounce without substantiation that "the vast majority of all Medicaid benefits provided are optional and the States are afforded a great deal of discretion...." Resp. 10-11 (emphasis added).

The parameters for the application of State Medicaid programs are set forth in excruciating detail at 42 U.S.C. §1396a(a)(1)-(65). This is hardly a program of unfettered choices. Where there are options, they are expressly granted. Equally express is the lack thereof. As examples, (I) a State plan for medical assistance must provide for making medical assistance to individuals who are "qualified pregnant women or children as defined in section 1905(n)";[3] (ii) must provide "for the inclusion of home health services for any individual

[3] §1396a(a)(10)(A)(I)(III).

who, under the State plan, is entitled to nursing facility services";[4] while (iii) a State plan must provide "at the option of a State, for making medical assistance available for COBRA premiums..."[5]

Adherence to the spousal provisions is not optional. A State plan for medical assistance "must meet the requirements of section 1924 [42 USCS §1396r-5](relating to protection of community spouses)." §1396a(a)(51)(emphasis added)(brackets and parenthetical in original). The options granted within that section are expressly stated. As State Respondents correctly note, the spousal provisions do allow for differences among the States - but these options are expressly provided. Specifically, States are allowed to choose higher minimum standard amounts for the spousal resource share and the minimum monthly maintenance needs allowance - a generous adjustment. Nowhere within the spousal provisions is there an option to give lesser than the minimum set by the law. Moreover, section (e)(2)(C) allows for no discretion in its application, as borne witness to by the litigation spawned in the wake of the individual States' substantively disparate applications of this law.[6]

NJAHCF argues that the availability of New Jersey's income first rule, "along with the discretion to establish the allowances..., maximizes the ability of each state to fashion and implement, again within circumscribed limits, Medicaid rules and regulations in order to protect community spouses while preventing couples from manipulating the Medicaid

[4] §1396a(a)(10)(D).

[5] §1396a(a)(10)(F)(emphasis added).

[6] State Respondents incorrectly assert that States have discretion in determining whether a community spouse is entitled to certain "excess shelter" costs in determining the MMMNA. Resp. 6. *See* 42 U.S.C. §1396r-5(d)(3) and (4). The law speaks for itself.

program...." Resp.6 (emphasis added). This is a bogus argument since there are no circumscribed limits in section (e)(2)(C) within which to apply discretion and Congress did not create in the spousal provisions a process whereby States could "fashion" rules and regulations. As a condition of participation in the Medicaid program, States must meet the requirements of §1396r-5 relating to the protection of community spouses. §1396a(a)51. That is the State's responsibility and mission with respect to these provisions. Congress itself attended to the safeguard of the Medicaid program as relates to the instant issue by providing for additional resources, if necessary at all, in an amount circumscribed by a formulaic determination of the specific income needs of the community spouse.

State Respondents contend that the fair hearing mechanism for adjusting the standard resource allowance, (section (e)(2)(C), is a shining example of the opportunity for discretionary application of the law. The language of section (e)(2)(C) is very clear. If a community spouse establishes that her income, combined with the income generated by the standard resource allowance, is insufficient to provide the income entitlement (MMMNA), then "there shall be substituted for the community spouse resource allowance under (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance." §1396r-5(e)(2)(C)(emphasis added). The discretion of which State Respondents speak is not there.

Indeed, in "resource first" States, there is variation in the methodology used to determine the exact amount of resources needed to generate the additional income for the community spouse who establishes her need at a fair hearing. For example, in the Commonwealth of Pennsylvania and the

State of Illinois, the administrative agency determines the community spouse's income "shortfall" and then increases the standard resource share by an amount that is equal to the cost of a commercial annuity that will provide that shortfall, based on the life expectancy of the community spouse. Such a procedure satisfies the statutory language and spirit of the spousal provisions.

IV. THE APPLICATION OF A UNIFORM NATIONAL SPOUSAL PROTECTION PLAN THAT APPLIES IN ALL STATES DOES NOT RENDER SECTION (e)(2)(C) SUPERFLUOUS.

State Respondents contend that a uniform application of the law would render the provision at issue superfluous. Once again, State Respondents evidence a misunderstanding of the Medicaid law, by suggesting that Congress could have accomplished what Petitioners urge by merely defining the "standard resource allowance as that amount needed to bring the community spouse's own monthly income up to the minimum monthly need amount." Resp.12.

State Respondents' error is that the community spouse's resource allowance was not established only to generate income for the community spouse. Section 1396r-5(c) provides the rules for the treatment of resources. A community spouse is allocated one-half of the total resources of the couple, up to a maximum amount that changes annually.[7] All community spouses, regardless of their income, receive this allocation. Thus, a community spouse earning $50,000

[7] As noted earlier, the statute grants States discretion to use the maximum figure rather than the one-half as the standard share (a more generous allowance).

annually, as well as her counterpart receiving only a modest Social Security payment, receives this grant. This is absolutely clear in the law and, to the best of the information, knowledge and belief of the undersigned, is faithfully implemented throughout the land. -

In addition, Congress recognized that those community spouses with limited income should have additional resources. Accordingly, a formula for determining a minimum income amount was included in the statute and those community spouses whose own income is below that amount are entitled to more than the standard share. The fair hearing is the forum in which the community spouse is given the opportunity to establish her need and additional resources are then allocated. It is that adjusted resource share that is tied to income and only those community spouses with limited income of their own are entitled to the adjusted share. Accordingly, State Respondents' suggestion that had Congress intended the resource first rule, it could have simply defined the standard share as that which would provide a community spouse with a minimum monthly need is without merit.

CONCLUSION

As discussed above, this Court's decision to decline to review a case in which the "resource first/income first" rules were similarly at issue should be of no significance in any interpretation of the merits of the instant matter. The accuracy of that conclusion notwithstanding, Petitioner respectfully urges this Court to heed the concerns expressed by Justice Black, dissenting in *Simmons v. Union News Co.*, 382 U.S. 884, 886 (1965):

> While we often say that nothing is decided by a denial of certiorari, all of us know that a denial of certiorari in this case, following the denial of certiorari in the ... [earlier] case, will undoubtedly lead people to believe, and I fear with cause, that this Court is now approving such a forfeiture of contractual claims....

Id. Analogously, a denial of the instant request for review may serve to foster the mistaken belief that this Honorable Court approves of the application of the statute at issue as now practiced in the Defendant State of New Jersey.

For all of the foregoing reasons, Petitioner reasserts her request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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